Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

KENDALL H. BREEDLOVE,

Petitioner

v.

JAMES R. HART, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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9200

QUESTIONS PRESENTED FOR REVIEW

1. Are Virginia mechanics' liens constitutional in their application of the Virginia mechanics' lien law (*i.e., Virginia Code (1950),* as amended, *§43-1* through *§43-23.2*) which are false, fraudulent, forged, perjured documents, claiming in the false, feigned name of a not-in-life, fictitious person—filed without predeprivation notice or opportunity to be heard—and without *any* postdeprivational remedies for redress of damage attributable to such mechanics' liens?

2. Are certain Virginia judicial procedures, associated with redress of damages, set forth in *Ayyildiz, M.D. v. Kidd*, 220 Va. 1080, 266 S.E.2d 108 (1980), constitutional in their application?

3. Was the Petitioner denied procedural due process, or Equal Protection under law, by the dismissal decision, *itself*, of the Virginia Supreme Court, when the Virginia Supreme Court failed to make the written determinations required by the U.S. Supreme Court's holding in *Coleman v. Thompson*, 501 U.S. 722, 115 L.Ed.2d 640, 111 S.Ct — (1991)—that the dismissal decision, *itself*, did not abridge any constitutional rights—and when the Court dismissed the instant action not on a fair and substantive basis, but on a non-jurisdictional, procedural matter, and without hearing the merits?

4. Was the Petitioner denied procedural due process, or Equal Protection under law, by the Virginia Supreme Court's decision, *itself*, to deny the *Petition for Rehearing* and let stand the dismissal of the appeal, when the Virginia Supreme Court: (a) ignored 15 new allegations invoking the holding of *Coleman v. Thompson, supra;* (b) failed *sua sponte* to make the the written determinations required by *Coleman v. Thompson, supra;* (c) refused on written motion to make the written determinations required by *Coleman v. Thompson, supra;* and (d) denied rehearing of the instant action, letting stand the dismissal decision, not on a fair and substantive basis, but on a

non-jurisdictional, procedural matter, and without hearing the merits?

5. Was the Petitioner denied procedural due process, or Equal Protection under law, or Civil Trial by Jury, by the Virginia Supreme Court failing to review and reverse the actions of the Virginia trial court in the instant action, which trial court dismissed the instant action in its entirety, with prejudice: (a) without hearing on the merits; (b) without necessary questions of fact being determined by a jury; and (c) with 34 motions and pleadings not ruled upon and without dispository orders being entered by the trial court for those 34 motions and pleadings?

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IN THE
SUPREME COURT OF THE UNITED STATES

KENDALL H. BREEDLOVE,
Petitioner

v.

JAMES R. HART, et al.
Respondents[1]

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Kendall H. Breedlove, the Petitioner in this appeal, respectfully prays that a *writ of certiorari* issue to review the judgments of the Supreme Court of the Commonwealth of Virginia, entered in the above-titled case on January 24, 1995, and April 21, 1995.

OPINIONS BELOW

1. The January 24, 1995, decision of the Virginia Supreme Court dismissed Petitioner's *Petition for Appeal*, under Rule 5:17 (f) of the *Rules of the Supreme Court of Virginia* for failure to pay the filing fee timely in the case, when the *Petition for Appeal* was filed timely in accordance with *Virginia Code (1950)*, as amended, *§8.01-674*, and when the fee was requested by the Clerk, paid, and accepted by the Clerk of the Virginia Supreme Court, and the *petition* was admitted to record, with the further filing of motions and memoranda by all parties and with general appearances by all parties. On its face, the January 24, 1995, order fails to set forth the written determinations required by the U.S. Supreme Court's holding in *Coleman v. Thompson*, 501 U.S. 722, 115 L.Ed.2d 640, 111 S.Ct — (1991), that the dismissal decision, *itself*, does not abridge any constitutional

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[1] The complete caption of the instant action is *Kendall H. Breedlove v. James R. Hart, and Calvin W. Phillips, aka D. Anderson, aka Dennis Anderson, aka Lester C. McCall, aka Inmate #89575 and Joyce E. Horton and James H. Horton, husband and wife, in their individual capacities, jointly and severally, and John Doe, defendant(s) unnamed.*

rights. This January 24, 1995, *order* is one of the decisions appealed herein to the U.S. Supreme Court and the January 24, 1995, *order* is reprinted as Appendix Exhibit 5, at page A11.

2. The April 21, 1995, decision of the Virginia Supreme Court: (a) denied Petitioner's *Petition for Rehearing*, dated February 7, 1995, and February 23, 1995; (b) denied the (1) Petitioner's *Motion for Determinations of No Abridgement of Constitutional Rights by the Court, as Required by U.S. Supreme Court in Coleman v. Thompson*, dated February 27, 1995; (2) Petitioner's *Motion for the Court To Exert Its Superintending and Protecting Powers As To Fraud on the Court and Perversion of Court Processes by Defendants/-Appellees*, dated February 25, 1995; and (3) Petitioner's *Motion For Written, Published, Self-Contained Memorandum Opinion of the Court's Findings, Rulings, and Decision in the Petition for Rehearing*, dated February 23, 1995; but (c) failed to rule on Petitioner's *Motion for Review of Petition for Rehearing By The Court Sitting En Banc*, dated February 23, 1995.

3. On its face, the April 21, 1995, *order* fails to set forth the written determinations required by the U.S. Supreme Court's holding in *Coleman v. Thompson*, *supra*, that the denial of the *Petition for Rehearing*, letting stand the January 24, 1995, dismissal decision, is a decision which, *itself*, does not abridge any constitutional rights, particularly in light of the facts that, (a) the Virginia Supreme Court ignored Petitioner's 15 new allegations in the *Petition for Rehearing* which invoked the holding of *Coleman v. Thompson, supra*; and (b) in the April 21, 1995, *order*, the Virginia Supreme Court denied Petitioner's *Motion for Determinations of No Abridgement of Constitutional Rights by the Court, as Required by U.S. Supreme Court in Coleman v. Thompson*, dated February 27, 1995. For the Petitioner's specific 15 new allegations to the Virginia Supreme Court, invoking *Coleman v. Thompson*, see Appendix Exhibit 12, at pages A26-A28, incorporated here by reference.

4. The April 21, 1995, *order* fails to state that the review of the *Petition for Rehearing* was conducted by the Court sitting *en banc*. This April 21, 1995, *order* is one of the decisions

appealed herein to the U.S. Supreme Court and the April 21, 1995, *order* is reprinted as Appendix Exhibit 6, at page A12.

JURISDICTION

The judgment of the Virginia Supreme Court, denying Petitioner's *Petition for Rehearing*, dated February 7, 1995, was entered April 21, 1995. The jurisdiction of this Court is invoked pursuant to 28 USC §1257 (a).

NOTICE CONCERNING 28 USC §2403 (b)

This Petition contains a challenge to the constitutionality of one or more of Virginia's statutes—the Virginia mechanics' lien law, specifically *Virginia Code (1950)*, as amended, *§43-1* through *§43-23.2*, and certain associated Virginia judicial procedures—in an action in which no officer or representative of the State of Virginia is a named party defendant. As such, this Petition invokes the mandatory procedures prescribed for federal courts by 28 USC §2403 (b), which procedures are not subject to any judicial discretion, for the U.S. Supreme Court to certify the challenge to the constitutionality of one or more Virginia statutes and to notify the Attorney General of Virginia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment of the United States Constitution, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.** "

And the Seventh Amendment of the United States Constitution:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, **the right of trial by jury shall be preserved,** and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Also involved is Article I, § 11, of the Virginia constitution:

"That **no person shall be deprived of his life, liberty, or property without due process of law**; ... that in controversies respecting property, and in suits between man and man, **trial by jury is preferable to any other, and ought to be held sacred.** * * * "

Also involved are the Virginia Code provisions regarding timely filing of a *petition for appeal, Virginia Code (1950),* as amended, *§8.01-671 A* and *§8.01-674:*

" **§ 8.01-671. Time within which petition must be presented.** — A. In cases where an appeal is permitted from the trial court to the Supreme Court, no petition shall be presented for an appeal to the Supreme Court from any final judgment whether the Commonwealth be a party of not, (i) which shall have been rendered more than three months before the petition is presented, provided, that in criminal cases, a thirty-day extension may be granted, in the discretion of the court, in order to attain the ends of justice, or (ii) if it be an appeal from a final decree refusing a bill of review to a decree rendered more than four months prior thereto, unless the petition is presented within three months from the date of such decree."

" **§ 8.01-674. With whom filed; endorsement thereon; reference to justice or justices; when deemed to be filed.** — The petition for appeal to the Supreme Court shall be filed with the Clerk of the Supreme Court. The Clerk shall endorse thereon the day and year he received it and shall refer it to one or more justices of the Supreme Court as the Court shall direct. A petition shall, for purposes of § 8.01-671, be deemed to be timely filed if

it is mailed postage prepaid to the Clerk by registered or certified mail and if the official postal receipt therefor is exhibited upon demand of the Clerk or any party and it shows mailing within the prescribed time limits."

Also involved are the Virginia mechanics' lien statutes, *Virginia Code (1950)*, as amended, *§43-1* through *§43-23.2*, and the Virginia Statute of Frauds, *Virginia Code (1950)*, as amended, *§11-2*.

STATEMENT OF THE CASE

1. Petitioner Breedlove suffered significant deprivations of constitutionally-protected rights resulting from private individuals, Phillips, *et al.*, filing—under Virginia's mechanics' lien law—two false, fraudulent, forged, perjured mechanics' liens; maliciously and for extortionate purposes, in the name of a not-in-life fictitious person—*Dennis Anderson*. Compounding these initial deprivations, they and their attorney, Hart, entered suit to enforce, claiming under (a) the claim of, (b) the lien of, and (c) the pretended right of that not-in-life person—*Dennis Anderson*—on behalf of Hart's client Phillips.

2. Prior to attorney Hart filing the suit to enforce, Petitioner Breedlove had written to Hart twice, informing Hart of the false, fraudulent, forged, perjured nature of these liens. Despite this information, attorney Hart caused additional mechanics' liens to be filed maliciously, changing the claimant name to Phillips, while still claiming under the *Dennis Anderson* lien and employing the initial false, fraudulent, forged, perjured *Dennis Anderson* lien as true. When attorney Hart maliciously entered suit to enforce, on behalf of his client Phillips, he employed as true the initial false, fraudulent, forged, perjured lien and a subsequent false, fraudulent, perjured lien in Arlington County, Virginia, and, furthermore, represented these liens as true to the court by *affidavit* of Phillips' sister, Joyce E. Horton, as agent for Phillips, thus perpetrating fraud on the court and fraud on a third person: Petitioner Breedlove.

3. The Virginia mechanics' lien law does not provide minimal predeprivation safeguards—notice and opportunity to

be heard—prior to a mechanics' lien attaching. Furthermore, the Virginia mechanics' lien law does not provide for the posting of a lienor bond as a predeprivation safeguard. There are no postdeprivational remedies for redress of damages attributable to false, fraudulent, forged, perjured mechanics' liens prescribed by Virginia statute and no entitlements to such redress created by Virginia case law.

4. Having no predeprivation safeguards under Virginia law, and no prescribed *entitlements* (either in Virginia statutory law or case law) to postdeprivational routes of redress for damages, Petitioner Breedlove pursued all postdeprivation remedies in Virginia for redress which offered even the slightest prospect of viability. Petitioner exhausted all postdeprivation remedies in Virginia and, thereby, demonstrated that Virginia's postdeprivational remedies for redress of damages caused by false mechanics' liens are inadequate and do not satisfy the constitutional strictures of due process under *Connecticut v. Doehr*, 501 U.S. 1, 115 L.Ed.2d 1, 111 S.Ct 2105 (1991).

5. a. The Virginia Supreme Court had *in personam* jurisdiction as to the Petitioner and as to all Respondents prior to the *dismissal order* of January 24, 1995, which dismissed not on a fair and substantive basis. The Virginia Supreme Court abrogated its jurisdiction on January 24, 1995: (a) without rendering constitutionally-required decisions on claims of violation of federal constitutional rights and federal civil rights; (b) without making the determinations required by *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970), and *Coleman v. Thompson, supra*; (c) without deciding all motions in the case; and (d) without rendering an opinion on the constitutionality of the Virginia mechanics' lien law and certain associated Virginia judicial procedures, challenged in the instant action and pleaded as being unconstitutional in the *Petition for Appeal* to the Virginia Supreme Court.[2]

b. By the dismissal, *itself*, the Virginia Supreme Court denied Petitioner of both his federal and Virginia procedural

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[2] *Petition for Appeal*, dated September 24, 1994, paragraphs 4a - 4e, at pages 12-13 thereof.

due process and deprived Petitioner of his federal constitutional and federal civil rights.

6. On April 21, 1995, the Virginia Supreme Court denied Petitioner's *Petition for Rehearing* and denied three of the Petitioner's four motions of February 23, 25, and 27, 1995, including (a) *Motion For Written, Published, Self-Contained Memorandum Opinion of the Court's Findings, Rulings, and Decision in the Petition for Rehearing;* (b) *Motion for the Court To Exert Its Superintending and Protecting Powers As To Fraud on the Court and Perversion of Court Processes by Defendants/Appellees,* and (c) *Motion for Determinations of No Abridgement of Constitutional Rights by the Court, as Required by U.S. Supreme Court in Coleman v. Thompson.* The Virginia Supreme Court failed to rule upon Petitioner's *Motion for Review of Petition for Rehearing By The Court Sitting En Banc,* dated February 23, 1995, and failed to state in the April 21, 1995, *order* that the consideration of the *Petition for Rehearing* had been conducted by the Court sitting *en banc.*

7. On May 25, 1995, the Virginia Supreme Court denied Petitioner's *Second Motion for Review of Petition for Rehearing, by the Court Sitting En Banc,* dated May 1, 1995, and failed to state therein that the review was conducted by the Court sitting *en banc.* Also on May 25, 1995, the Court issued its *order* deferring issuance of mandate, pending docketing of the instant appeal with the U.S. Supreme Court until July 20, 1995.

8. The denials of federal and Virginia procedural due process and deprivation of Petitioner's federal constitutional rights and federal civil rights by Virginia courts are demonstrated by the course of proceedings set forth in Appendix Exhibit 11, at pages A19-A25.

REASONS FOR GRANTING THE WRIT

I. The Virginia Supreme Court committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law (a) by violating the holding of the U.S. Supreme Court in *Coleman v. Thompson, supra,* that a

Virginia petition for appeal "need only be filed filed within three months of the final judgment of a trial court," and (b) by violating the Court's own holding in *Reese v. Wampler Foods, Inc., et al.*, 222 Va. 249, — S.E.2d — (1981), that a petition for appeal is timely filed with the Court when it is forwarded to the Clerk of the Court by certified mail, postage prepaid, within the statutory time limit for filing the *petition for appeal.*

1. Petitioner complied with the two jurisdictional elements set forth by the U.S. Supreme Court for appeals to the Virginia Supreme Court: (a) timely filing of the *petition for appeal*, and (b) timely filing of the *notice of appeal*.[3]

2. Petitioner forwarded his *Petition of Appeal* to the Clerk of the Court by certified mail, postage prepaid, on September 24, 1994, within the statutory time limit for filing the *petition for appeal*, and exhibited the receipt for that certified mailing to the clerk, without demand.

3. Thus, Petitioner filed his *Petition of Appeal* timely on September 24, 1994, within three months following the final judgment of the Arlington County Circuit Court on June 24, 1994, and, thereby, satisfied that jurisdictional element.

4. Petitioner filed his *notice of appeal* on July 21, 1994, with the Arlington County Circuit Court, timely, within 30 days following the entry of a final judgment by the trial court (on June 24, 1994), and, thereby, satisfied necessary jurisdictional conditions precedent to filing the *petition for appeal.*

5. Thus, the Petitioner's appeal satisfied the necessary jurisdictional elements to confer jurisdiction upon the Virginia Supreme Court.

6. Furthermore, the Virginia Supreme Court possessed *in personam* jurisdiction as to all parties: by timely filing of the *Petition for Appeal*; by notice; by general appearances; and by the filing of briefs, motions, and memoranda by all parties.

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[3] *Coleman v. Thompson, id.*, 115 L.Ed.2d, at 664.

II. The Virginia Supreme Court committed prejudicial error, denied procedural due process, and denied equal protection under law by violating the Court's own holding in *Tharp v. Commonwealth, supra,* and violating the U.S. Supreme Court's holding in *Coleman v. Thompson, supra,* by failing to make a determination that dismissing the instant *Petition for Appeal,* in and of itself, (a) would not abridge any constitutional rights and, therefore, (b) would not merit such necessary excusal of inexact compliance with an administrative rule for a non-jurisdictional filing fee—Rule 5:17 (f)—when the filing fee was requested, collected, and accepted subsequent to the timely filing of the *Petition for Appeal,* and when the *Petition* was admitted to record after the filing fee was collected, and when the appeal fee was paid timely concurrent with the timely filing of the timely *Notice of Appeal.*

1. The Virginia Supreme Court's dismissal, *itself,* abridged one or more of Petitioner's federal constitutional rights, in that it violated procedural due process and equal protection under law.

2. The Virginia Supreme Court ignored Petitioner's allegations invoking the holding of *Coleman v. Thompson, supra,* which allegations are set forth in the section entitled, "New Allegations Regarding This Petition For Rehearing," at pages 6-7 of the *Petition for Rehearing,* dated February 7, 1995, and at pages 4-6 of the *Court-Directed Replacement, Double-Spaced Petition for Rehearing,* dated February 23, 1995. For the Petitioner's specific allegations to the Virginia Supreme Court, invoking *Coleman v. Thompson,* **see** Appendix Exhibit 12, at pages A26-A28, incorporated here by reference.

3. The Virginia Supreme Court failed *sua sponte* to make a determination, consistent with *Tharp v. Commonwealth, supra,* that dismissing the instant *Petition for Appeal,* in and of itself, would not abridge any constitutional rights.

4. The Virginia Supreme Court failed *sua sponte* and refused, upon written motion, to make a determination,

consistent with *Coleman v. Thompson, supra*, that the dismissal, *itself*, would not abridge any constitutional rights.[4]

5. The Virginia Supreme Court failed to afford comity to the federal procedural rules, particularly the federal court treatment of Fed. R. App. P. 3 (e), in an appeal litigating federal constitutional rights.

6. The Virginia Supreme Court, in an appeal litigating federal constitutional rights: (1) failed to demonstrate its respect for the weight placed by federal courts upon non-jurisdictional appellate fee requirements and (2) failed to give to the state procedural rule—Rule 5:17 (f)—the same effect that federal courts give to the equivalent federal rule—Fed. R. App. P. 3(e)—which may be excused by federal courts of appeal.

7. The Virginia Supreme Court's failure to excuse and dismissing under a non-jurisdictional, discretionary rule, rather than on a fair and substantive basis, precluded the Virginia Supreme Court's hearing the merits and rendering decisions on the constitutional questions presented.

8. The dismissal decision of the Virginia Supreme Court does not rest on a fair and substantial ground and, therefore, cannot hope to evade federal review, simply by dismissal on Rule 5:17 (f), rather than (*arguendo*) on *Virginia Code §14.1-120*.[5]

9. These actions by the Virginia Supreme Court were done to set the stage: (a) for a dismissal not on a fair and substantive basis, but on a non-jurisdictional, administrative matter, to preclude hearing the merits of the constitutionality of the Virginia mechanics' lien law under Connecticut v. Doehr, supra, and (b) to evade subsequent federal review of the state court's dismissal under a procedural rule.

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[4] *Coleman v. Thompson, id.*, 115 L.Ed.2d, at 664.

[5] *Virginia Code §14.1-120* states, in part:

"**§ 14.1-120. Clerk of Supreme Court.** — The Clerk of the Supreme Court shall charge the following fees:

" In every case in which a petition is presented, twenty-five dollars, which shall be collected at the time such petition of presented."

10. These wilful actions and failures of the Virginia Supreme Court denied Petitioner procedural due process and violated his federal constitutional rights.

III. The Virginia Supreme Court committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by violating the holding of the U.S. Supreme Court in *Ward v. Board of County Comm'rs*, 253 U.S. 17, 64 L.Ed 751, 40 S.Ct 419 (1920), by disregarding the Court's duty (neglecting or renouncing a jurisdiction conferred by law), after the Virginia Supreme Court possessed *in personam* jurisdiction as to all parties, by notice, general appearances, and the filing of briefs, motions, and memoranda.

1. The U.S. Supreme Court has stated that the duty of courts:

> "cannot be disregarded without neglecting or renouncing a jurisdiction conferred by the law and designed to protect and maintain the supremacy of the constitution and the laws made in pursuance thereof. *Ward v. Board of County Comm'rs*, 253 US 17, 23, 64 L Ed 751, 40 S Ct 419 (1920). Indeed, the duty arose out of a distinct distrust of state courts, which the Court perceived as attempting to evade federal review."[6]

2. The U.S. Supreme Court has also stated:

> "Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not thus be evaded."[7]

3. The Virginia Supreme Court possessed *in personam* jurisdiction as to all parties: by timely filing of the *Petition for*

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[6] Cited by Justices Blackmun, Marshall, and Stevens, in their dissent to *Coleman v. Thompson, id.* 115 L.Ed.2d, at 676-77.

[7] *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 US 537, 540, 74 L Ed 1023, 50 S.Ct 401 (1930), cited by Justices Blackmun, Marshall, and Stevens, in their dissent to *Coleman v. Thompson, id.* 115 L.Ed.2d, at 677.

Appeal; by notice; by general appearances; and by the filing of briefs, motions, and memoranda by all parties.

4. Thus, having acquired jurisdiction in the instant *Petition for Appeal*, the Virginia Supreme Court improperly renounced that jurisdiction in the instant appeal, over three months later, without hearing the merits of federal constitutional questions raised in the appeal.

IV. The Virginia Supreme Court committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by ignoring multiple fraud on the court by the Respondents in the lower, trial court, pleaded in the trial-court motions for judgment and in the appeal to the Virginia Supreme Court.

1. The Virginia Supreme Court has a supervisory responsibility to maintain a fair and impartial court system in Virginia.

2. The Petitioner was subjected to repeated frauds on the court by Respondents, as defendants, which Respondents converted into frauds on the plaintiff (the Petitioner), prior to trial, and was subjected to frauds on the court by Respondents during trial. These frauds on the court are demonstrated in the record. **See** Appendix Exhibit 15, "Details of Respondents' Fraud on the Court, Highlighted from the Virginia Supreme Court Record," at pages A46–A49, and incorporated herein by reference, for highlights from the record.

3. By its dismissal under Rule 5:17 (f), the Virginia Supreme Court (a) has ignored the Respondents' repeated frauds on the court; (b) has abrogated the Court's supervisory responsibility to maintain a fair and impartial court system in Virginia; (c) has denied Petitioner his federal and state civil rights; and (d) has failed to enforce the holdings of *Howard v. Rawson*, 29 Va. (2 Leigh) 733 (1830), and *Pates v. St. Clair*, 52 Va. (II Gratt. 22) 25 (1854), that the court will police abuse of its processes, when those processes are used in feigned names, as was done in the instant action by the use of the feigned name of

a fictitious, not-in-life person—*Dennis Anderson*—as mechanics' lien claimant.

V. The Virginia Supreme Court committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by employing Rule 5:17 (f) as jurisdictional, rather than as discretionary and, thereby, abused its discretion and failed to afford comity to federal courts' treatment of equivalent federal procedural rules.

1. The Respondents moved the Virginia Supreme Court to dismiss for the Petitioner's failure to file his *Petition for Appeal* timely (which is an argument of lack of jurisdiction), because the $25 filing fee was requested, collected, and cashed by the Clerk of the Virginia Supreme Court, subsequent to the Petitioner's timely filing of the *Petition for Appeal* and prior to the clerk admitting the *Petition for Appeal* to record.

2. The Virginia Supreme Court's dismissal order of January 24, 1995, states, in part:

> "...[A]ppellees ... filed a motion to dismiss because of the appellant's failure to pay the filing fee timely in this case.
>
> "* * * On consideration whereof, the Court grants said appellees' motion and dismisses the petition for appeal in the above styled case. Rule 5:17 (f). "

3. *Virginia Code (1950),* as amended, *§8.01-674* states that a *petition for appeal* is timely filed under the following conditions:

> "A petition shall, for purposes of § 8.01-671, be deemed to be timely filed if it is mailed postage prepaid to the Clerk by registered or certified mail and if the official postal receipt therefor is exhibited upon demand of the Clerk or any party and it shows mailing within the prescribed time limits."

4. Rule 5:17 (f) is a rule of the Supreme Court of Virginia, which states:

> "(f) *Filing Fee.* — The petition must be accompanied by a check or money order payable to the clerk of this Court for the amount required by statute. The statutory fee shall be collected at the time such petition is presented and the clerk of this Court shall not file a petition that is not accompanied by such fee."

5. Petitioner complied with the two jurisdictional elements set forth by the U.S. Supreme Court for appeals to the Virginia Supreme Court: (a) timely filing of the *petition for appeal*, and (b) timely filing of the *notice of appeal*.[8] For details as to filing dates of the *Petition for Appeal* and *Notice of Appeal*, see Appendix Exhibit 11, "Course of Proceedings before the Trial Court and before the Virginia Supreme Court," paragraphs 1–5, at page A19, incorporated here by reference.

6. The Virginia Supreme Court failed to rule on whether Rule 5:17 (f) is a jurisdictional rule, affecting the timeliness of filing of a *petition for appeal*, or a non-jurisdictional, administrative rule subject to discretion, expecially in appeals litigating federal constitutional rights. In its January 24, 1995, order, the Court transmuted the appellees' prayer of a jurisdictional defect into a dismissal based on a non-jurisdictional, procedural rule 5:17 (f).

7. The dismissal of the instant *Petition for Appeal* by the Virginia Supreme Court is predicated upon two incorrect premises: (a) that Rule 5:17(f) is a jurisdictional rule affecting timeliness of filing of a *petition for appeal*, and (b) that Rule 5:17(f) is a jurisdictional rule not subject to being excused in an appeal litigating federal constitutional rights.

8. The U.S. Supreme Court has held in *Coleman v. Thompson, supra*,[9] that Virginia *petitions for appeal* "need only be filed within three months of the final judgment of a trial court. Rule 5:17 (a) (1)."[10] The U.S. Supreme Court also stated that the Virginia *notice of appeal* must be filed timely

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[8] *Coleman v. Thompson, id.*, 115 L.Ed.2d, at 664.

[9] *Coleman v. Thompson* is a Virginia case, addressing Virginia petitions for appeal addressed to the Virginia Supreme Court and to dismissals under Rule 5:17.

[10] *Coleman v. Thompson, id.* 115 L.Ed.2d, at 664.

with the local trial court.[11] The U.S. Supreme Court did not state any other jurisdictional requirements associated with a Virginia *petition for appeal*. Therefore, the timing of collection of the filing fee does not affect timeliness of *the Petition for Appeal* (and consequent jurisdiction).

9. The application of Rule 5:17 (f) is discretionary and within the prerogative of the Virginia Supreme Court to extend, to waive, or to excuse (*e.g.*, in the instance of litigants proceding *in forma pauperis*). If the application of Rule 5:17 (f) were truly mandatory and jurisdictional, the Court would have no authority to hear any causes of paupers who were unable to pay the $25 filing fee and, thus, for failure to pay a fee timely, a litigant could be denied his constitutional rights. If paupers who do not pay the $25 filing fee can have their timely-filed *petitions for appeal* heard, then Petitioner is denied equal protection under law by the Court dismissing his timely-filed *Petition for Appeal*, for the $25 filing fee being collected subsequent to his timely filing of his *Petition for Appeal*. Therefore, Rule 5:17 (f) is subject to being excused in an appeal litigating federal constitutional rights.

10. Consequently, the Virginia Supreme Court's dismissal order is in error for being violative of the holding of *Coleman v. Thompson, supra*, in both premises.

11. The U.S. Supreme Court stated in *Coleman v. Thompson, supra*, that it eliminated "inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own."[12]

12. Where a federal constitutional right is involved in a state appeal, the state court, on the basis of comity, must adhere to at least the level of procedural due process as the federal courts would adhere to in processing the claim.

a. The federal procedural rule, Fed. R. App. P. 3(e), equivalent to Rule 5:17 (f), states:

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[11] *Ibid.*
[12] *Id.*, 115 L.Ed.2d, at 670.

> "(e) **Payment of Fees**. Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals."

b. Federal case law relating to Fed. R. App. P. 3(e) indicates that the failure to prepay the statutory filing fee does not constitute a jurisdictional defect. See, *e.g.*, *Parissi v. Telechron*, 349 U.S. 46 L.Ed 867, 75 S.Ct 577 (1955). Similarly, under present Fed. R. App. P. 12, failure to pay the docket fee within the time prescribed **may be excused** by the court of appeals. See, *e.g.*, *Walker v. Mathews*, 546 F.2d 814 (9th Cir., 1976).[13]

13. Thus, the Virginia Supreme Court failed to afford comity to the federal procedural rules, particularly Fed. R. App. P. 3 (e), and to the treatment of those rules by federal courts, in an appeal litigating federal constitutional rights.

VI. The Virginia Supreme Court committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by violating either the principle of estoppel or the principle of waiver.

1. The filing of the instant *Petition for Appeal* by the Clerk, admitting it to record and assigning Virginia record number 941785, waived the concurrent-collection-with-filing duty of the Clerk under Rule 5:17 (f).

2. The Court is estopped *in pais* to procede along one course of action, accepting the $25 filing fee, cashing the check, and admitting the *petition* to record, processing the *petition for appeal*, calling for the filing of pleadings, and scheduling oral argument; then, over three months later, abruptly, and without due process, reneging and asserting a contrary position—that

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[13] Cited in 17 *S. Ct. Digest*, Fed. R. App. P. 3 "Advisory Committee Notes," at page 151-152.

the *petition for appeal* is not entitled to be filed or to be heard—and offering to refund the filing fee.

3. The Court's about-face is demonstrated by the Court: (a) taking no steps to return the *petition* or to collect the $25 filing fee following its receipt of the timely-filed *petition*, until telephoned by Petitioner; (b) directing the Petitioner to send in the $25 filing fee, twenty-five days later, when Petitioner telephoned the clerk's office to learn the record number assigned to the petition; (c) receiving, accepting, and cashing Petitioner'scheck for the $25 filing fee; (d) admitting the instant *Petition for Appeal* to record by assigning a record number 941785, (thus waiving the concurrent-collection-with-filing duty of the clerk of the court prescribed by Rule 5:17(f)); (e) accepting briefs, motions, and memoranda from all participants in the case (constituting general appearances); (f) scheduling oral argument; (g) requesting the Petitioner to file a memorandum of law responding to the joint motion to dismiss (which he filed); and then, (h) dismissing the instant *Petition for Appeal* under Rule 5:17(f), when the appellees' joint motion to dismiss prayed for dismissal based on the *Petition for Appeal* allegedly being filed untimely.

4. The Virginia Supreme Court, acting without due process, deprived Petitioner of his *entitlement* to have his timely-filed *Petition for Appeal*, containing substantive federal constitutional questions, heard on the merits.

5. The Court's violation of the principles of estoppel and waiver combined with lack of procedural due process to deprive Petitioner of his *entitlement*, without due process and, thus, abridged Petitioner's federal and state constitutional rights.

VII. The Virginia Supreme Court committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by abrogating its responsibility under the federal constitution and abrogating its supervisory responsibility over Virginia courts, by permitting and continuing a pattern of unconstitutional conduct of courts in Virginia: (a) to maintain the enforceability in Virginia of unconstitutional Virginia mechanics' lien laws (*Virginia Code*

***§43-1 et seq.*) (in contravention of *Connecticut v. Doehr, supra*) and associated Virginia judicial customs and (b) to permit those mechanics' lien laws and associated customs to evade constitutional review.**

1. In 1988, the Virginia Supreme Court held in *Donohoe Constr. Co. v. Mount Vernon Assoc.*, 235 Va. 531, 369 S.E.2d 857 (1988), that a mechanics' lien is a judicial action and is not subject to action for defamation.

2. In June, 1991, the U.S. Supreme Court held in *Connecticut v. Doehr, supra*, as follows:

> "To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.' *Peralta v. Heights Medical Center, Inc.*, 485 US 80, 85, 99 L Ed 2d 75, 108 S Ct 896 (1988) [additional citations omitted]."

3. Eighteen months ago, in January, 1994, the Virginia Supreme Court refused to hear the Petitioner's previous *petition for appeal* in *Breedlove v. Phillips, et al.*, (Va., 19th Cir., Fairfax at law #117967, Va. record no. 931104 [unpublished], 1994; pet. for reh. denied, 1994; pet. for cert. denied, 1994), which foreclosed postdeprivational remedies for redress of damages attributable to false, fraudulent, forged, perjured Virginia mechanics' liens under causes of action for common-law defamation, statutory defamation, and slander of title. This decision was based on *Donohoe, supra.*

4. The Virginia Supreme Court's dismissal, in its January 24, 1995, *order*, of the instant *Petition for Appeal* foreclosed (without any trial on the merits) the postdeprivational remedies for redress of damages attributable to false, fraudulent, forged, perjured Virginia mechanics' liens under causes of action for malicious prosecution, abuse of process, and conspiracy.

5. In neither *Breedlove* case was there any trial or hearing on the merits or any memorandum opinion published to explain: (a) the failure of the Virginia Supreme Court, in its refusal and dismissal decisions, and denials of rehearing, to comply with the U.S. Supreme Court holding in *Coleman v. Thompson, supra;* or (b) the failure of the Virginia Supreme Court, in its refusal and dismissal decisions, and denials of rehearing, to comply with the U.S. Supreme Court holding in *Connecticut v. Doehr, supra.*

6. Taken together, these two Virginia Supreme Court decisions in the *Breedlove* cases, which began in 1992, subsequent to *Connecticut v. Doehr, supra*: (a) have demonstrated that all routes (*i.e.*, common-law defamation, statutory defamation, slander of title, malicious prosecution, abuse of process, and civil conspiracy) for redress of damages caused by false, fraudulent, forged, perjured Virginia mechanics' liens are foreclosed (without any trial on the merits); (b) have denied jury trial or any trial on the merits; and (c) have proven conclusively that, in Virginia, no adequate postdeprivational remedies for redress of damages exist under the Virginia mechanics' lien law.

7. a. Other litigants prior to Petitioner Breedlove have challenged the constitutionality of the Virginia mechanics' lien law, under theories arising under *Connecticut v. Doehr, supra.* Some of these litigants were the Federal Deposit Insurance Corporation, Commonwealth Land Title Insurance Company, and American Security Bank.

b. These other cases raised the question of constitutionality of the Virginia mechanics' lien law as a defense to liens otherwise adjudicated valid. In contrast, in the *Breedlove* cases, the false, fraudulent, forged, perjured mechanics' liens were previously adjudicated to be "is and was invalid," by a Virginia court in two separate §43-17.1 validity hearings, and the *Breedlove* cases, including the instant action, have demonstrated that there are no postdeprivational remedies for redress of damages attributable to such liens under Virginia law.

8. a. On August 13, 1992, in Arlington County Circuit Court, in the trial-court case (chancery no. 90-1000) underlying *Commonwealth Land Title Ins. Co., et al. v. Corman Const. Co., et al.*, (S.Ct. number 92-1871 [unpublished], 1992) the oral ruling of the Arlington Court stated:

> "...[T]he court is of the opinion that there is no significant property interest that is affected by the application of the Virginia statutory mechanics' lien scheme and, therefore, it's constitutional on its face.
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> " The Court is also of the opinion that any doubt about that is cured by the statute's meeting requirements of procedural due process under the Fourteenth Amendment.
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> " And therefore, the record should reflect that the Court finds that the statutory schemes provided under Virginia's mechanics' lien statute are constitutional on their face and in their application."[14]

b. This decision was not published by the Arlington Circuit Court.

9. a. On February 22, 1993, the Virginia Supreme Court issued its order refusing to hear the appeal of *Federal Deposit Insurance Co. v. Corman Constr. Co., et al.*, (Va.S.Ct. record number 921452 [unpublished], 1993), stating:

> "Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment

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[14] *Commonwealth Land Title Ins. Co v. Corman Const. Co., et al.*, S.Ct. number 92-1871, "motion to intervene and pet. for cert.," filed May 24, 1993, at page 4a. The holding of *Connecticut v. Doehr, supra*, is that liens deprive the property owner of a significant property interest. Additionally, the holding of *Connecticut v. Doehr, supra*, is that constitutional Due Process is required—notice and an opportunity to be heard—in addition to any procedural due process, before a lien deprives a property owner of a significant property interest.

complained of. Accordingly, the Court refuses the petition for appeal."[15]

b. This decision by the Virginia Supreme Court, affirming the lower court's decision of constitutionality, was not published.

10. a. On October 23, 1992, in Fairfax County Circuit Court, in the trial court case (chancery no. 121870) underlying *Amer. Sec. Bank v. Dempsey Supply Corp.*, (S.Ct. number 93-236 [unpublished], 1993), the oral ruling of the Fairfax Court stated:

> "THE COURT: * * * I feel that the Virginia [*mechanics' lien*] Statute is constitutional in all respects, that it does provide constitutional due process and that the subcontractor mechanics' lien holder priority is based upon his enhancement of the land through his work and does create an interest."[16]

b. This constitutionality decision was not published by the Fairfax Circuit Court

11. a. On August 4, 1993, the Virginia Supreme Court issued its order refusing to hear the appeal of *Amer. Sec. Bank v. Dempsey Supply Corp.*, (Va.S.Ct. record number 930590 [unpublished] (1993), stating:

> "Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment

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[15] *Commonwealth, op. cit.*, at page 1a.

[16] *Amer. Sec. Bank v. Dempsey Supply Corp.*, S.Ct. number 93-236, "pet. for cert.," filed August 13, 1993, at page 4a. The Fairfax trial judge neglected to consider the U.S. Supreme Court's holding in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 825, 94 L.Ed 865, 70 S.Ct 652 (1950), that minimum constitutional Due Process is notice and an opportunity to be heard before an impartial tribunal, which the Virginia mechanics' lien law fails to provide.

complained of. Accordingly, the Court refuses the petition for appeal."[17]

b. This decision by the Virginia Supreme Court, affirming the lower court's decision of constitutionality, was not published.

12. The Virginia mechanics' lien law (*Virginia Code §43-1 et seq.*) does not provide minimal predeprivation safeguards—notice and opportunity to be heard—prior to a mechanics' lien attaching. These is no showing of exigent circumstances mitigating the need for predeprivational hearing and no requirement for the lienor to post a lienor bond to protect the lienee. Furthermore, the Virginia mechanics' lien law makes no provision for an immediate post-deprivational hearing *immediately* after the lien attaches, and not in the normal course of the court's docket, in which the lienor bears the burden of proof.

13. There being no predeprivation safeguards under the Virginia mechanics' lien law to prevent the deprivations to which Respondents subjected the Petitioner, Petitioner Breedlove pursued his post-deprivation remedies in Virginia for redress of damages: first, in *Breedlove v. Phillips, et al., supra*, (sounding in common-law defamation, statutory defamation, and slander of title) and, secondly, in *Breedlove v. Hart, et al., supra*, (sounding in malicious prosecution, abuse of process, and conspiracy). Both postdeprivation routes for redress were foreclosed by Virginia courts, without any trial on the merits.

14. a. On October 30, 1992, the Fairfax County Circuit Court dismissed upon *demurrer* Petitioner's prior suit *Breedlove v. Phillips, et al.*, (Fairfax at law #117967), sounding in common-law defamation, statutory defamation, and slander of title) under the holding of *Donohoe Constr. Co. v. Mount Vernon Assoc., supra*, that a mechanics' lien is a judicial action and is not subject to action for defamation.

b. The Fairfax Court applied this ruling to false, fraudulent, forged, perjured documents entitled mechanics' liens which

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[17] *Amer. Sec. Bank, op. cit.*, at page 1a.

were pleaded as being sham and as to defendants who were neither parties nor pleaders to these documents entitled mechanics' liens, in contravention of *White v. Nicholls*, 3 How. (44 U.S.) 266, 11 L.Ed 591, — S.Ct — (1845) and contrary to *Laun v. Union Electric Co. of Missouri*, 350 Mo. 572, 166 S.W.2d 1065, 144 ALR 622 (1942).

c. This decision was not published by the Fairfax Circuit Court.

d. These mechanics' liens against Petitioner Breedlove were subsequently adjudicated to be "is and was invalid," prior to Petitioner's request for rehearing of the *demurrer* hearing and denial of rehearing by the Fairfax Circuit Court on July 5, 1993.

15. a. On January 13, 1994, the Virginia Supreme Court issued its order refusing to hear the appeal of *Breedlove v. Phillips, et al.*, Va. record number 931104, stating:

> "Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal. The motion to dismiss filed by appellees Joyce E. Horton and James H. Horton and the appellant's motion to strike the brief in opposition are hereby denied."

b. This decision by the Virginia Supreme Court, affirming the lower court's application of *Donohoe Constr. Co. v. Mount Vernon Assoc., supra*, to deny causes of action sounding in defamation, and foreclosing certain potential postdeprivational routes of redress for false, fraudulent, forged, perjured Virginia mechanics' liens, was not published.

16. On June 24, 1994, after 10 months of intense litigation in the trial-court case *Breedlove v. Hart, et al.*, (at law 93-872), in the Arlington Count Circuit Court, underlying the instant *Petition for Appeal*, the Arlington Court dismissed the five-

count action upon third *demurrer*, under the English rule, as that English rule is set forth in *Ayyildiz, M.D. v. Kidd*, 220 Va. 1080, 266 S.E.2d 108 (1980). Petitioner Breedlove pointed out to the Arlington trial judge that the Virginia interpretation of the English rule is at variance with the interpretation of the English rule in other states, and that difference of interpretation is not the result of state statute and, therefore, peculiar either to Virginia or to other States, as sovereign states.

17. a. The dismissal of malicious prosecution, abuse of process, and conspiracy counts in the instant action was based on the following rulings by the Arlington County Circuit Court:

(1) [*As to pleadings*] that the allegations of the *second amended motion for judgment* were not an improper pleading, but that the pleaded false, fraudulent, forged, perjured mechanics' liens are not properly the basis of either malicious prosecution or abuse of process causes of action in Virginia.

(2) [*As to malicious prosecution*] that a Virginia mechanics' lien does not cause seizure of property (not withstanding the fact that the Arlington court had twice exercised its *in rem* jurisdiction previously in the *Virginia Code §43-17.1* validity hearings, regarding these false mechanics' liens, by virtue of the liens' seizure of the *res*); that there was no arrest of the person and no special injury;[18]

(3) [*As to abuse of process*] that abuse of process only applies in Virginia to events subsequent to *properly-issued* process and, because the initial November 27, 1991 mechanics' lien was improperly issued, there could be no abuse of such an improperly-issued process. The May 22, 1992 mechanics' lien (charged as being abusive of process) did not abuse the November 27, 1991 mechanics' lien, even though the May 22, 1992 lien:

(a) had changed the name of the claimant without legal-holder *affidavit* and released part of the lien amount claimed (i)

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[18] The Arlington Circuit Court considered argument under *Connecticut v. Doehr, supra*, set forth in paragraph F. 14 *et seq.*, at pages 23-24 of the instant *Petition for Appeal*, dated September 24, 1994, in reaching its ruling.

to exclude work alleged done before 150 days prior to the November 27, 1991 filing; and (ii) to fall below the $25,000 threshold of the Virginia statute of frauds on an alleged unsecured, verbal contract, while still claiming under the initial, improperly-issued, November 27, 1991 lien of, the claim of, and the pretended right of a not-in-life fictitious, feigned claimant, *Dennis Anderson,*[19] and

(b) had employed the initial false, fraudulent, forged, perjured November 27, 1991 mechanics' lien as true and as basis for suit to enforce, the subsequent May 26, 1992 lien could not be an abuse of the initial November 27, 1991 lien process, even though being based upon forged documents and perjured supporting *affidavits*, and being represented to the court as true in suit to enforce, constituting fraud on the court and fraud on the plaintiff, and pleaded as such.

(4) [*As to conspiracy*] that there could be no civil conspiracy if there was no malicious prosecution and no abuse of process, despite the fact that the Petitioner had alleged illegal purpose (*i.e.*, extortion) and eight specific illegal means by the defendants to carry out the extortion.

b. In other words, false, fraudulent, forged, perjured mechanics' liens cannot be redressed through causes of action for malicious prosecution, abuse of process, or conspiracy.

c. The Arlington Circuit Court denied verbally the Petitioner's written motion to publish its decision, and the trial judge stated that he was too busy to write a memorandum opinion or to publish such opinion.

18. These Virginia cases and rulings, cited in paragraphs VII. 8 – 17 c, above, contravene the due process strictures of *Connecticut v. Doehr, supra.*

19. a. On January 24, 1994, the Virginia Supreme Court, without making determinations (pursuant to *Tharp v.*

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[19] Bringing suit in false, feigned names of not-in-life persons has been held in Virginia to be an abuse of the process of the court in *Howard v. Rawson, supra,* and in *Pates v. St. Clair, supra.*

Commonwealth, supra, and Coleman v. Thompson, supra) that its decision to dismiss would not abridge any constitutional rights, issued its order dismissing the instant appeal, stating:

> " On November 7, 1994 came appellees James R. Hart, James H. Horton and Joyce E. Horton, by counsel, and filed a motion to dismiss because of the appellant's failure to pay the filing fee timely in this case.
>
> " Thereupon came Kendall H. Breedlove, in proper person, and filed a memorandum in opposition to said motion.
>
> " On consideration whereof, the Court grants said appellees' motion, and dismissed the petition for appeal in the above-styled case. Rule 5:17(f). "[20]

b. This decision by the Virginia Supreme Court: (1) affirming the lower court's application of *Ayyildiz, M.D. v. Kidd,* 220 Va. 1080, 266 S.E.2d 108 (1980), and the English rule to deny causes of action sounding in malicious prosecution, abuse of process, and conspiracy; (2) foreclosing (without any trial on the merits) the remaining potential postdeprivational routes of redress (of malicious prosecution or abuse of process) hinted at in *Donohoe, supra,* as possibly being available for false, fraudulent, forged, perjured Virginia mechanics' liens; and (3) failing to rule on the pleaded unconstitutionality of the Virginia mechanics' lien law, *by its application,* as contrary to *Connecticut v. Doehr, supra,* was not published and the Court failed to rule on Petitioner's motion for the Court to publish its findings, rulings, and decision.

20. Until the January 24, 1995, dismissal of the instant *Petition for Appeal* by the Virginia Supreme Court, the prior refusals to grant *certiorari* by the U.S. Supreme Court to review refusals of appeals by the Virginia Supreme Court in mechanics' lien cases might (*arguendo*) be understood on the

---

[20] Compare with the Virginia Supreme Court's January 13, 1994, order in *Breedlove v. Phillips, et al., supra,* quoted in paragraph VII. 15 a, page 23, which also ruled on (*i.e.*, denied) two outstanding motions. In the January 24, 1995, dismissal order, the Court failed to rule on two motions and one memorandum outstanding at the time of dismissal in the instant case.

basis that the published Virginia case of *Donohoe Constr. Co. v. Mount Vernon Assoc., supra*, was held out as offering the theoretical prospect of postdeprivational redress of damages attributable to mechanics' liens through causes of action for malicious prosecution or abuse of process, yet without absolutely assuring entitlement to such routes of redress; even while *Donohoe* foreclosed redress through causes of action for defamation, preventing trial on the merits under that cause of action.

21. With the dismissal of the instant *Petition for Appeal*, without any trial on the merits, however, Petitioner has exhausted his state-prescribed, postdeprivation remedies and, thereby, demonstrated that Virginia's postdeprivational remedies for redress of damages caused by false, fraudulent, forged, perjured mechanics' liens: (a) are inadequate to the point of non-existence, and (b) do not satisfy the constitutional strictures of due process under *Connecticut v. Doehr, supra*.

22. The actions of Virginia courts in these four, above-cited, Virginia cases, which challenge the constitutionality of the Virginia mechanics' lien law (*Virginia Code §43-1 et seq.*), as being unconstitutional under theories arising under *Connecticut v. Doehr, supra*, or which tested the postdeprivation remedies available to redress damages under that Virginia mechanics' lien law, demonstrate a pattern of conduct by Virginia courts, in which the Virginia courts: (a) failed to apply the updated, *Doehr*-version, three-part *Mathews*[21] test for constitutionality, mandated by *Connecticut v. Doehr, supra*, for private-party-initiated deprivations; (b) made conclusory rulings of constitutionality of the Virginia mechanics' lien law, contravening the holding of the U.S. Supreme Court in *Connecticut v. Doehr, supra*; and (c) failed to publish these decisions or other decisions in cases where the constitutionality of the Virginia mechanics' lien law is challenged.

a. Litigants in the four above-cited cases challenging the constitutionality of the Virginia mechanics' lien law have argued that the law is unconstitutional by the updated, *Doehr*-

[21] *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct 893 (1976).

version three-part *Mathews* test mandated by *Connecticut v. Doehr, supra*, for private-party-initiated deprivations.

b. The Virginia trial courts have responded with decisions that the Virginia mechanics' lien law is constitutional, on the *a priori* premise that sufficient postdeprivational remedies exist, so the courts have either failed or refused to apply the *Doehr*-version, three-part *Mathews* test and have failed or refused to publish the Virginia trial courts' verbal opinions. The Virginia Supreme Court has refused repeatedly to offer an opinion on the question of the constitutionality of the Virginia mechanics' lien law, since the 1991 holding of *Connecticut v. Doehr, supra*, refusing the appeals of or dismissing these litigants, without hearing on the merits.

c. The two *Breedlove* cases shatter the erroneous assumption that *any* Virginia remedies exist for redress of damages attributable to private-party-initiated false, fraudulent, forged, perjured mechanics' liens.

d. The pattern of unpublished mechanics' lien cases in Virginia has the effect of maintaining the surface appearance in the published Virginia case law of the availability of potential postdeprivational remedies, which in actuality and in every instance are dismissed, refused, or denied, without a good-faith application of the the *Doehr*-version, three-part *Mathews* test for private-party-initiated deprivations.

e. Thus, the Commonwealth of Virginia has performed a bait-and-switch maneuver—hinting at in *Donohoe, supra*, the prospect of remedies for redress of mechanics' liens by causes of action for malicious prosecution and abuse of process which, when pursued, are foreclosed by Virginia courts, prior to trial on the merits.

23. The Virginia Supreme Court's dismissal of the instant *Petition for Appeal* (challenging the constitutionality of the Virginia mechanics' lien law) on the timeliness of payment of a filing fee is a tactic employed by the Virginia Supreme Court to deny the Appellant federal constitutional rights, protection, and review, based on a decision of a state court not on a fair and

substantive basis. The Virginia Supreme Court's dismissal is an attempt to evade the federal constitutional obligations to decide the federal constitutional questions pleaded in the instant *Petition for Appeal.*

24. The Virginia Supreme Court's dismissal of the instant *Petition for Appeal*, abrogates the Court's responsibility under the federal constitution and abrogates its supervisory responsibility over Virginia courts to police fraud on the court and abuses of court processes and, thus, permits and continues a pattern of unconstitutional conduct of courts in Virginia: (a) to maintain the enforceability of unconstitutional Virginia mechanics' lien laws (*Virginia Code §43-1* through *§43-23.2*) (in contravention of *Connecticut v. Doehr, supra*) and associated judicial customs; and (b) to permit those mechanics' lien laws and associated judicial customs to evade constitutional review.

VIII. The Virginia Supreme Court committed prejudicial error, denied procedural due process, and denied equal protection under law by violating the Court's own holding in *Tharp v. Commonwealth, supra,* ae holding of the U.S. Supreme Court in *Coleman v. Thompson, supra,* by failing to make a determination that denying the instant *Petition for Rehearing*, and thereby dismissing the instant action not on a fair and substantive basis, in and of itself, would not abridge any constitutional rights.

1. Paragraphs II. 1 through II. 8 are restated here and incorporated by reference.

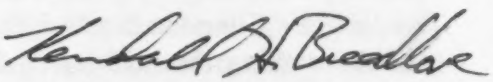
CONCLUSION

The Virginia Supreme Court's dismissal, *itself*, abridged one or more of Petitioner's federal constitutional rights, in that it violated procedural due process and equal protection under law. The Virginia Supreme Court ignored Petitioner's 15 new allegations invoking the holding of *Coleman v. Thompson, supra*, in the *Petition for Rehearing*, dated February 7, 1995, and dated February 23, 1995. On the faces of the January 24, 1995, *dismissal order*, and of the April 21, 1995, *order*, the Virginia Supreme Court failed *sua sponte* to make a determination,

consistent with *Tharp v. Commonwealth, supra*, that dismissing the instant *Petition for Appeal*, in and of itself, would not abridge any constitutional rights. On the faces of the January 24, 1995, *dismissal order*, and of the April 21, 1995, *order*, the Virginia Supreme Court failed *sua sponte* and refused, upon written motion, to make a determination, consistent with *Coleman v. Thompson, supra*, that the dismissal, *itself*, would not abridge any constitutional rights.

WHEREFORE, Petitioner prays that a *Writ of Certiorari* issue from this Court to review the judgments of the Supreme Court of Virginia in *Breedlove v. Hart, et al.*, Virginia record no. 941785. In the event this *Petition* is granted, Petitioner prays that this Court remand this case to the Virginia Supreme Court, with direction for the Virginia Supreme Court to make written determinations consistent with *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970), and with *Coleman v. Thompson*, 501 U.S. 722, 115 L.Ed.2d 640, 111 S.Ct — (1991). In the event that the dismissal decision, *itself*, in the instant appeal, is found to have abridged Petitioner's federal constitutional rights or Virginia constitutional rights, that this Court direct the Virginia Supreme Court then to hear the merits of the appeal and to render the Virginia Supreme Court's published opinion, in a manner consistent with *Connecticut v. Doehr*, 501 U.S. 1, 115 L.Ed.2d 1, 111 S.Ct 2105 (1991), on the challenges raised in the instant appeal to the constitutionality of the Virginia mechanics' lien law, *Virginia Code (1950) §43-1* through *§43-23.2*, and of certain associated Virginia judicial procedures, set forth in *Ayyildiz, M.D. v. Kidd*, 220 Va. 1080, 266 S.E.2d 108 (1980), and delineated more fully in the Petitioner's *Petition for Appeal* to the Virginia Supreme Court; together with such other and further relief as may seem proper to this Court.

Respectfully submitted,



Kendall H. Breedlove, *pro se*
2831 Gallows Road, Suite 145
Falls Church, Virginia 22042

CERTIFICATE OF SERVICE

SS: COMMONWEALTH OF VIRGINIA
County of Fairfax, to-wit:

KENDALL H. BREEDLOVE, being first duly sworn, upon his oath deposes and says that he is a Petitioner filing *pro se,* in this cause, and that on this 20th day of July, 1995, pursuant to Rule 29.5 (c) of the *Supreme Court Rules,* he mailed three copies each of the ***Petition for Writ of Certiorari*** by first-class mail, postage prepaid, addressed to the counsel of record for the Respondents, who were represented by counsel, and to the *pro se* Respondent, who was not represented by counsel, as follows:

Mr. John O. Easton
Jordan, Coyne & Savits, counsel of record for Respondent
James R. Hart
10486 Armstong Street
Fairfax, Virginia 22030

Mr. J. Charles Curran
Kidwell, Kent & Curran, counsel of record for Respondents
Joyce E. Horton and James H. Horton
9695-C Main Street
Fairfax, Virginia 22031

Mr. Calvin W. Phillips, *pro se*
201 West Broad Street
Suite 144
Falls Church, Virginia 22046

Pursuant to Rule 29.4 (c), citing that 28 USC §2403 (b) may be applicable, he mailed three copies of the *Petition for Writ of Certiorari* by certified mail, postage prepaid, as follows:

The Honorable James S. Gilmore, III
Attorney General of the Commonwealth of Virginia
Supreme Court Building
101 N. 8th Street
Richmond, Virginia 23219

Kendall H. Breedlove

Kendall H. Breedlove, *pro se*

THE FOREGOING CERTIFICATE OF SERVICE was subscribed and sworn to before me on the 20th of July, 1995. by Kendall H. Breedlove

Notary Public

My commission expires: 3-31-96

APPENDIX TO

KENDALL H. BREEDLOVE,
Petitioner

v.

JAMES R. HART, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

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APPENDIX

***Exhibit 1** (January 26, 1994, trial court order accepting Phillips answer and curing Phillips' default)*

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

KENDALL H. BREEDLOVE, Plaintiff,	:	
v.	:	At Law No. 93-872
JAMES R. HART, et al., Defendants	:	

ORDER

THIS CAUSE came on to be heard on the 14th of January, 1994, having been continued from the 10th day of December, 1993, upon the *Plaintiff's Motion to Strike Calvin W. Phillips' Answer*, filed December 9, 1993, and was argued in open court, and

IT APPEARING TO THE COURT THAT in accordance with Rule 3:5 of the *Rules of the Supreme Court of Virginia*, Calvin W. Phillips had 21 days from October 26, 1993, the date of service by Deputy Sheriff upon Sheriff Thomas Faust, as duly-appointed *committee* for Calvin W. Phillips, in which to file through Phillips' *committee*, Phillips' responsive pleadings to the Plaintiff's *Amended Motion for Judgment*, dated October 22, 1993. Thus, such responsive pleadings from Phillips, through his *committee*, were due by close of business on November 16, 1993, which day was not a Saturday, Sunday, holiday, or day on which the offices of the Clerk of the Court were closed; and

IT FURTHER APPEARING TO THE COURT THAT Calvin W. Phillips filed no *demurrer* and no *answer*, and no *grounds of defense*, or other responsive pleadings to the *Amended Motion for Judgment* with this Court by November 16, 1993, *prior to January 13, 1994*,

IT FURTHER APPEARING TO THE COURT THAT Calvin W. Phillips and Phillips' *committee* did not file a motion for an extension of time in which to file Phillips' answer, or *demurrer*,

or *grounds of defense* to Plaintiff's *Amended Motion for Judgment* by November 16, 1993, or subsequently thereto; and

IT FURTHER APPEARING TO THE COURT THAT Sheriff Thomas Faust filed *affidavit,* certifying that on October 29, 1993, Sheriff Faust had forwarded to Calvin W. Phillips, at Phillips' last-known address, the writ of *notice of motion for judgment* and service copy of the *Amended Motion for Judgment* which the Sheriff had accepted as *committee* for Calvin W. Phillips when served with them on October 26, 1993. This October 29th date was more than 10 days before the date stated in the writ of *notice of motion for judgment* when judgment could be entered against Phillips' *committee* or against Calvin W. Phillips. Sheriff Thomas Faust filed this *affidavit* certificate on November 24, 1993, with the Clerk of this Court, in accordance with *Virginia Code §8.01-315.*

IT FURTHER APPEARING TO THE COURT THAT Calvin W. Phillips' *Answer to Amended Motion For Judgment* (which Phillips mailed to the Plaintiff on November 30, 1993) was ***not*** filed with this Court prior to the close of business on November 16, 1993, or *before January 13, 1994, and accordingly is outside the required time for answering*; and

IT FURTHER APPEARING TO THE COURT THAT *Plaintiff's Motion to Strike Calvin W. Phillips' Answer* is denied; and it is therefore

ORDERED, ADJUDGED AND DECREED that *Plaintiff's Motion to Strike Calvin W. Phillips' Answer* ought to be, and it hereby is, denied; and *Calvin W. Phillips answer, mailed to other parties in November, 1993, and filed in the clerk's office January 13, 1994 is deemed timely and the court grants an extension of time to January 13, 1994.*

THIS CAUSE IS CONTINUED.

ENTERED this 26th day of January, 1994.

Paul F. Sheridan (signed)
Paul F. Sheridan,
CIRCUIT COURT JUDGE

I ASK FOR THIS:

Kendall H. Breedlove (signed) *objected to as to permission for late filing and as to effect on default by Phillips*
Kendall H. Breedlove,
Plaintiff, *pro se*
2831 Gallows Road, Suite 145
Falls Church, VA 22042

Seen ~~and Excepted to~~:

J. Charles Curran (signed)
J. Charles Curran
Virginia Bar No. 21455
Kidwell, Kent & Sullivan
Counsel for Defendants Joyce and James Horton
9695-C Main Street
Fairfax, VA 22031
(703) 764-0600

Seen ~~and Excepted to~~:

John O. Easton (by VFS) (signed)
John O. Easton
Virginia Bar No. 17302
Jordan, Coyne & Savits
Counsel for Defendant James R. Hart
10486 Armstrong Street
Fairfax, VA 22030
(703) 246-0900

Seen and ~~Excepted to~~: *objected to as to the double address*

C Phillips (signed)
Calvin W. Phillips, *pro se*
310 ~~301~~ Maple Avenue West
Suite 198
Vienna, VA 22180 (being the address which Phillips, himself, furnished to Sheriff Thomas Faust, Phillips' *committee*, by letter on November 10, 1993, for use in forwarding legal mail to Phillips.)

~~Calvin W. Phillips, *pro se*~~
~~310 Maple Avenue West~~
~~Suite 198~~
~~Vienna, VA 22180 (being the address where Phillips has been found by Plainitff to have a postal box.)~~

***Exhibit 2** (May 9, 1994, trial court order, sustaining demurrers of Respondents Hart, Horton, and Horton to Counts I – IV)*

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

KENDALL H. BREEDLOVE	:	
Plaintiff,	:	
v.	:	At Law No. 93-872
JAMES R. HART, *et al.*,	:	
Defendants	:	

ORDER

THIS MATTER came on the 26th day of January, 1994 before the Court upon the Demurrers of Defendants James R. Hart and James and Joyce Horton to Plaintiff's Amended Motion for Judgment, and[22]

IT APPEARING from the Demurrers, the record herein, and the argument of counsel that the said Demurrers are well-founded, it is

ORDERED that the Plaintiff shall have twenty-one (21) days from January 26, 1994 to file his Second Amended Motion for Judgment to allege a seizure of property with respect to his claims of malicious prosecution and to allege specific acts committed by Defendants after initiation of process with respect to his claim for abuse of process, and to reallege his conspiracy claims, and it is further

ORDERED that all Defendants shall have twenty-one (21) days after service of the Second Amended Motion for Judgment within which to file their responsive pleadings.

And this cause is continued.

---

[22] The trial court's leave for amendment pertained only to Counts I - IV, the only counts in which Respondents Hart, Horton, and Horton were parties defendant, as Respondent Phillips had previously answered to Counts I - V and was at issue with Petitioner as to Counts I - V since January 26, 1994, and as Phillips was the sole defendant in Count V.

ENTERED this 9th day of ~~January~~ May, 1994;

Paul F. Sheridan (signed)
The Honorable Paul F. Sheridan

SEEN AND AGREED AS TO SUSTAINING OF DEMURRERS AND SEEN AND OBJECTED TO AS TO GRANTING PLAINTIFF LEAVE TO AMEND:

JORDAN, COYNE & SAVITS
10486 Armstrong Street
Fairfax, VA 22030
(703) 246-0900
By *John O. Easton* (signed)
John O. Easton, VSB #17302
Virginia F. Shevlin, VSB #34984
Counsel for defendant James R. Hart

KIDWELL, KENT & SULLIVAN
Woodson Square
9695-C Main Street
Fairfax, VA 22031
By *J. Charles Curran* (signed)
J. Charles Curran, Esquire VSB #21455
Counsel for defendants Joyce Horton
and James Horton

SEEN AND OBJECTED AS TO SUSTAINING OF DEMURRERS AND SEEN AND AGREED TO AS TO GRANTING PLAINTIFF LEAVE TO AMEND: *Objected to as to fourth paragraph of page as to time for submitting Second Amended Motion for Judgment due to force majeure circumstances and conflicting Virginia Supreme Court filings.*

Kendall H. Breedlove (signed)
Kendall H. Breedlove
Suite 145
2831 Gallows Road
Falls Church, VA 22042
Plaintiff *pro se*

SEEN:

C. Phillips (signed)
Calvin W. Phillips
Pro se defendant

***Exhibit 3** (June 24, 1994, trial court final order of dismissal, dismissing the action in its entirety)*

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

KENDALL H. BREEDLOVE	:	
Plaintiff,	:	
v.	:	At Law No. 93-872
JAMES R. HART, *et al.*,	:	
Defendants	:	

FINAL ORDER

THIS MATTER CAME before the Court on the 9th day of May, 1994, on the Demurrers of defendants James R. Hart, James Horton, Joyce Horton and Calvin W. Phillips to plaintiff's Second Amended Motion for Judgment, and[23]

UPON CONSIDERATION of the Demurrers, the briefs filed by the parties and argument of counsel, *pro se* plaintiff and *pro se* defendant Phillips, the Court finds, as stated on the record, that the causes of action pleaded in Counts II, IV and V for malicious prosecution through malicious use of civil process should be dismissed because those counts fail to allege an arrest of the person of the plaintiff, any special injury, or seizure of plaintiff's property; and the cause of action pleaded in Count III for abuse of civil process should be dismissed because it fails to allege the requisite elements of such a cause of action; and that the cause of action pleaded in Count I for civil conspiracy

[23] The trial court dismissed the instant action in its entirety, despite the facts: (a) that Respondent Phillips had been at issue with Petitioner since January 26,1994, as to Count V; (b) that Respondent Phillips had filed a ***demurrer*** to the ***Second Amended Motion for Judgment***, as to amended Counts I - IV, and to unamended Count V, on March 10, 1994, then pleaded over his own demurrer by filing his ***Answer to the Second Amended Motion for Judgment***, on March 14, 1994. And whereas the trial court had previously accepted Phillips previous answer on January 14, 1994, to cure Phillips' default, the trial court now flip-flopped and ignored Phillips' March 14, 1994, ***answer***, to cure Phillips' pleading over and to recognize Phillips' ***demurrer*** of March 10, 1994, even as to Count V on which Phillips and Petitioner had been at issue since January 26, 1994, by the trial court's previous action.

should be dismissed because the Second Amended Motion for Judgment fails to allege an unlawful act; and a claim for punitive damages should be dismissed because all other causes of action are dismissed. It is, therefore,

ORDERED that all of the defendants' Demurrers are sustained as to Counts I, II, III, IV and V of the Second Amended Motion for Judgment, and the causes of action pleaded in Counts I, II, III, IV and V are hereby dismissed with prejudice in their entirety.

AND THIS CAUSE IS ENDED.

ENTERED this 24 day of June, 1994.

Paul F. Sheridan (signed)
Paul F. Sheridan
Circuit Court Judge

WE ASK FOR THIS:

JORDAN, COYNE & SAVITS
10486 Armstrong Street
Fairfax, Virginia 22030
(703) 246-0900
By *John O. Easton* (signed)
John O. Easton, VSB #17302
Virginia F. Shevlin, VSB #34984
Counsel for Defendant James R. Hart

KIDWELL, KENT & CURRAN
9695-C Main Street
Fairfax, VA 22030
By *J. Charles Curran* (signed)
J. Charles Curran, VSB #21455
Counsel for Defendants James Horton
and Joyce Horton

In re: Final Order, *Kendall H. Breedlove v. James R. Hart, et al.*, Circuit Court of Arlington County, Law No. 93-872

C. Phillips (signed)
Calvin W. Phillips
310 Maple Avenue, Suite 198
Vienna, VA 22180
Defendant *pro se*

SEEN AND OBJECTED TO: *as not embodying fairly and accurately the verbal rulings of May 9, 1994, hearing; and incorporated herein are the objections and reasons in Plaintiffs' Memorandum in Opposition to Entry of Draft Final Order, dated and filed June 16, 1994*

Kendall H. Breedlove (signed)
Kendall H. Breedlove *pro se*
2831 Gallows Road, Suite 145
Falls Church, VA 22042
Plaintiff, *pro se*

***Exhibit 4** (July 22, 1994, trial court order denying motion to rehear, closing out the instant action with 34 pleadings not ruled upon and without dispository orders)*

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

KENDALL H. BREEDLOVE	:	
Plaintiff,	:	
v.	:	At Law No. 93-872
JAMES R. HART, *et al.*,	:	
Defendants	:	

FINAL ORDER

THIS MATTER CAME before the Court on the 6th day of July, 1994, on the plaintiff's motion to rehear, and

IT APPEARING to the Court from the pleadings filed herein and argument in open court that the motion to rehear should not be granted, it is hereby

ORDERED that the plaintiff's motion to rehear is denied *and plaintiff's motion to remove to Federal Court is denied as moot.*

AND THIS CAUSE IS ENDED.

ENTERED this 22nd day of July, 1994.

Paul F. Sheridan (signed)
Paul F. Sheridan
Circuit Court Judge

WE ASK FOR THIS:

JORDAN, COYNE & SAVITS
10486 Armstrong Street
Fairfax, Virginia 22030
(703) 246-0900
By *John O. Easton* (signed)
John O. Easton, VSB #17302

Virginia F. Shevlin, VSB #34984
Counsel for Defendant James R. Hart

KIDWELL, KENT & CURRAN
9695-C Main Street
Fairfax, VA 22030
By *J. Charles Curran* (signed)
J. Charles Curran, VSB #21455
Counsel for Defendants James Horton
and Joyce Horton

C. Phillips (signed)
Calvin W. Phillips
310 Maple Avenue, Suite 198
Vienna, VA 22180
Defendant *pro se*

SEEN AND OBJECTED TO: *as to: (a) the Court's refusal to hear nine motions and five associated memoranda noticed by Plaintiff for July 6, 1994, and identified in praecipe dated May 20, 1994; (b) the Court's signing and entering a final order on June 24, 1994, prior to hearing all motions and pleadings in the case (over 34 pleadings without dispository orders) and prior to hearing the Plaintiff's Petition to Rehear; (c) the Court's denial of the Plaintiff's Petition to Rehear; (d) the Court's violation of Plaintiff's Federal civil rights guaranteed under the Fourteenth and Seventh Amendments of the Constitution of the United States and Article I, §11, of the Virginia Constitution and secured by 42 USC §1983, detailed more fully in Plaintiff's Memorandum in Support of Plaintiff's Petition to Rehear, dated and filed July 1, 1994, and incorporated herein by reference; and (e) the Court's lack of jurisdiction subsequent to July 15, 1994, the date 21 days after entry of the final order of June 24, 1994.*

Kendall H. Breedlove (signed)
Kendall H. Breedlove *pro se*
2831 Gallows Road, Suite 145
Falls Church, VA 22042
Plaintiff, *pro se*

***Exhibit 5** (January 24, 1994, Virginia Supreme Court order dismising the Petition for Appeal, not on a fair and substantive basis, but on a non-jurisdictional, procedural matter)*

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 24th *day of* January, 1995.

Kendall H. Breedlove, Appellant,

against Record No. 941785
Circuit Court No. 93-872

James R. Hart, *et al.*, Appellees.

From the Circuit Court of Arlington County

On November 7, 1994 came appellees James R. Hart, James H. Horton and Joyce E. Horton, by counsel, and filed a motion to dismiss because of the appellant's failure to pay the filing fee timely in this case.

Thereupon came Kendall H. Breedlove, in proper person, and filed a memorandum in opposition to said motion.

On consideration whereof, the Court grants said appellees' motion, and dismisses the petition for appeal in the above-styled case. Rule 5:17(f).[24]

A Copy,
Teste:
David B. Beach (signed)
Clerk

[24] Note that on the face of the January 24, 1994, *dismissal order*, the Virginia Supreme Court has failed to make the written determinations, required by the Virginia Supreme Court, itself, in *Tharp v. Commonwealth, supra,* and required by the U.S. Supreme Court in *Coleman v. Thompson, supra,* that the dismissal decision, itself, not on a fair and substantive basis, but on a non-jurisdictional procedural matter, does not abridge any of Petitioner's constitutional rights.

***Exhibit 6** (April 21, 1994, Virginia Supreme Court order denying the Petition for Rehearing, allowing the dismissal to stand, and refusing to make the written Coleman v. Thompson determinations, that the dismissal decision, itself, does not abridge any constitutional rights)*

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 21st *day of* April, 1995.

Kendall H. Breedlove, Appellant,

against Record No. 941785
Circuit Court No. 93-872

James R. Hart, *et al.*, Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 24th day of January, 1995 and grant a rehearing thereof, the prayer of the said petition is denied.[25]

On further consideration whereof, the Court denies the appellant's "Motion for Determinations of No Abridgement of Constitutional Rights," "Motion for the Court to Exert Its Superintending and Protecting Powers," and "Motion for Written, Published, Self-Contained Memorandum Opinion."[26]

---

[25] Note that on the face of the April 21, 1995, *order*, the Virginia Supreme Court has failed to state that the *Petition for Rehearing*, was considered *en banc*, for which Petitioner requested rehearing *en banc*, by his *Motion for Review of Petition for Rehearing, by the Court Sitting En Banc*, dated February 23, 1995, which motion the Court also failed to rule upon, closing the instant action with motions outstanding, without dispository orders.

[26] Note that on the face of the April 21, 1994, *order*, the Virginia Supreme Court has failed to make the written determinations, required by the Virginia Supreme Court, itself, in *Tharp v. Commonwealth, supra*, and required by the U.S. Supreme Court in *Coleman v. Thompson, supra*, that the dismissal decision, itself, not on a fair and substantive basis, but on a non-jurisdictional procedural matter, does not abridge any of Petitioner's constitutional rights.

A Copy,
Teste:
David B. Beach (signed)
Clerk

Moreover, the Virginia Supreme Court has denied Petitioner's ***Motion for Determinations of No Abridgement of Constitutional Rights by the Court, as Required by U.S. Supreme Court in Coleman v. Thompson***, dated February 27, 1995. The ***Petition for Rehearing*** contained the necessary allegations to invoke the holding of ***Coleman v. Thompson, supra.*** For these ***Coleman v. Thompson*** allegations, reprinted from the ***Petition for Rehearing***, see Appendix Exhibit 12, at pages A26–A28.

Exhibit 7 (May 25, 1995, Virginia Supreme Court order denying the Second Motion for Review of Petition for Rehearing, by the Court Sitting En Banc)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 25th *day of* May, 1995.

Kendall H. Breedlove, Appellant,

against Record No. 941785
Circuit Court No. 93-872

James R. Hart, *et al.*, Appellees.

From the Circuit Court of Arlington County

On May 3, 1995 came Kendall H. Breedlove, in proper person, and filed a "Second Motion for Review of Petition for Rehearing, by the Court Sitting *En Banc.* "

On consideration whereof, the Court denies the motion.[27]

A Copy,
Teste:
David B. Beach (signed)
Clerk

---

[27] Note that on the face of the May 25, 1995, *order*, the Virginia Supreme Court has failed to rule upon the Petitioner's *Motion for Review of Petition for Rehearing, by the Court Sitting En Banc*, dated February 23, 1995, which motion the Court also failed previously to rule upon, and has closed the instant action with motions outstanding, and without dispository orders. See and compare Clerk's letter, dated May 26, 1995, reprinted as Appendix Exhibit 9, which asserts that the *Petition for Rehearing* was considered by the Court, sitting *en banc*.

***Exhibit 8** (May 25, 1995, Virginia Supreme Court order deferring issuance of mandate)*

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 25th *day of* May, 1995.

Kendall H. Breedlove, Appellant,

against Record No. 941785
Circuit Court No. 93-872

James R. Hart, *et al.*, Appellees.

ORDER DEFERRING ISSUANCE OF MANDATE

On consideration of the request of Kendall H. Breedlove, in proper person, it is ordered that issuance of the mandate in this case be and the same hereby is deferred, to and including the 20th day of July, 1995, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance of the mandate shall be deferred until the final determination of the case by that Court.[28]

A Copy,
Teste:
David B. Beach (signed)
Clerk

[28] The request for deferred issuance of mandate was contained in the Petitioner's *Second Motion for Review of Petition for Rehearing, by the Court Sitting En Banc*, dated May 1, 1995, which the Virginia Supreme Court denied in the other May 25, 1995, *order*, reprinted as Appendix Exhibit 7.

***Exhibit 9** (May 26, 1995, letter from Clerk of the Virginia Supreme Court, asserting rehearing* en banc*)*

SUPREME COURT OF VIRGINIA
DAVID B. BEACH, CLERK
Supreme Court Building
100 North 9th Street, 4th Floor
Richmond, Virginia 23219
(804) 786-2251 V/TDD
Fax: (804) 371-8530

May 26, 1995

Mr. Kendall H. Breedlove
2831 Gallows Road, Suite 145
Falls Church, Virginia 22042

Re: *Kendall H. Breedlove*
v. James R. Hart, et al.
Record No. 941785

Dear Mr. Breedlove:

Enclosed are two orders concerning your case. The Court has instructed me to advise you that your petition for rehearing was considered by the Court sitting *en banc*.[29]

Sincerely yours,

David B. Beach (signed)

David B. Beach
Clerk

[29] Why would the Virginia Supreme Court twice refuse to hear *en banc*, if the Court purportedly heard the *Petition*, sitting *en banc*?

***Exhibit 10** (May 3, 1995, Notice of Appeal to U.S. Supreme Court)*

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

KENDALL H. BREEDLOVE, Plaintiff/Appellant	:	
v.	:	Record No. 941785
JAMES R. HART, et al. Defendants/Appellees	:	

PLAINTIFF/APPELLANT'S NOTICE OF APPEAL

COMES NOW the Plaintiff/Appellant, Kendall H. Breedlove, *pro se*, and states as follows for his Notice of Appeal, pursuant to Rule 5:41 of the *Rules of the Supreme Court of Virginia*:

1. Plaintiff/Appellant declares his intention, in compliance with Rule 5:41 of the *Rules of the Supreme Court of Virginia*, to file an appeal with the Supreme Court of the United States, or to seek a writ of certiorari from that court, from the final determination by this Court:

a. In denying Plaintiff/Appellant's *Petition for Appeal*, in order dated January 24, 1995; and

b. In denying Plaintiff/Appellant's *Petition for Rehearing*, in order dated April 21, 1995.

2. Plaintiff/Appellant states that his Constitutional rights to due process, to equal protection under law, and to civil trial by jury have been denied to him.

3. Plaintiff/Appellant asks that the Virginia Supreme Court stay any mandate pending review by the Supreme Court of the United States in the instant action.

Respectfully submitted,
Kendall H. Breedlove (signed)
Kendall H. Breedlove, *pro se*
2831 Gallows Road, Suite 145
Falls Church, VA 22042

CERTIFICATE

Pursuant to Rule 5:17 of the *Rules of the Supreme Court of Virginia*, Plaintiff/Appellant, *pro se*, certifies as follows:

(a) The appellant is Kendall H. Breedlove, representing himself *pro se*, 2831 Gallows Road, Suite 145, Falls Church, Virginia 22042, no telephone number presently.

(b) The appellees are:

James R. Hart, who is represented by Mr. John O. Easton of Jordan, Coyne & Savits, 10486 Armstrong Street, Fairfax, Virginia 22030;

Joyce E. Horton and James H. Horton, who are represented by Mr. J. Charles Curran, of Kidwell, Kent & Curran, 9695-C Main Street, Fairfax, Virginia 22031; and

Calvin W. Phillips, who is *pro se*, 201 West Broad Street, Suite 144, Falls Church, Virginia 22046.

(c) The undersigned hereby certifies that he caused one copy of the foregoing Plaintiff/Appellant's Notice of Appeal to the served by first-class mail, postage prepaid, upon each of the following: Mr. John O. Easton of Jordan, Coyne & Savits, 10486 Armstrong Street, Fairfax, Virginia 22030, counsel for James R. Hart; Mr. J. Charles Curran, of Kidwell, Kent & Curran, 9695-C Main Street, Fairfax, Virginia 22031, counsel for Joyce E. Horton and James H. Horton; and Calvin W. Phillips, *pro se*, 201 West Broad Street, Suite 144, Falls Church, Virginia 22046, on this **3rd** day of May, 1995.

Kendall H. Breedlove (signed)
Kendall H. Breedlove, *pro se*
2831 Gallows Road, Suite 145
Falls Church, VA 22042

Exhibit 11 *(Course of Proceedings before the Trial Court and before the Virginia Supreme Court)*

1. On June 24, 1994, in the Circuit Court of Arlington County, Virginia (the trial court), the Honorable Paul F. Sheridan, Judge, dismissed all five counts (sounding in malicious prosecution, abuse of process, and conspiracy) of Petitioner's *Second Amended Motion for Judgment*, dated February 17, 1994, as to all defendants, with prejudice, even though Petitioner was at issue as to Respondent Phillips, with respect to Counts I – V.

2. On July 21, 1994, Petitioner filed with the Arlington County Circuit Court, Petitioner's *Notice of Appeal*, timely, within 30 days following the entry of a final judgment by the trial court, and paid the $32 appeal fee to the Arlington County Circuit Court. The receipt for this appeal fee payment states payment in full.

3. On August 18, 1994, Petitioner filed with the Arlington County Circuit Court, Petitioner's *written statement of facts*, timely, within 55 days days following the entry of a final judgment by the trial court.

4. On September 23, 1994, Respondent Phillips filed a motion to dismiss on the grounds that Petitioner failed to follow Virginia Rule 5:9 and did not mail the *written statement of facts* to Phillips' correct address, when Petitioner had mailed the documents to the official address for Phillips on file with the court, and when Phillips had not filed any change of address with the court or with plaintiff. This motion was not ruled on by the Virginia Supreme Court.

5. On September 24, 1994, Petitioner filed with the Virginia Supreme Court, Petitioner's *Petition for Appeal* by postage-prepaid, first-class, certified mail, in *Breedlove v. Hart, et al.*, record no. 941785, timely, within three months following the final judgment of the lower, trial court, in accordance with Virginia Code (1950), as amended, §8.01-671, which states that

the appeal must be filed with the Virginia Supreme Court within three months of the final judgment.

a. The *Petition for Appeal* came on appeal from the Circuit Court of Arlington County, Virginia, wherein the Honorable Paul F. Sheridan, Judge, had sustained defendants' Hart and the Hortons' third *demurrer* to counts I – IV, dated March 11, 1994, and dismissed Plaintiff's *Second Amended Motion for Judgment*, filed February 17, 1994, counts I – V, as to all defendants, including defendant Phillips (the sole defendant of count V), with prejudice, after Petitioner was at issue with defendant Phillips.

b. Petitioner's *Petition for Appeal* claimed six major possible sources of error, and subsidiary issues under each major error, each of which violates Petitioner's constitutional rights, in Judge Sheridan's decision of June 24, 1994. **See** "Table 1. Trial Court Errors and Constitutional Effects," from the *Petition for Appeal*, reproduced as Appendix Exhibit 11, and incorporated herein by reference.

6. On September 26, 1994, Petitioner forwarded by *praecipe* to the Virginia Supreme Court: (a) three additional copies of his *Petition for Appeal*; (b) a copy of his receipt for certified mailing of his *petition*, showing mailing date of September 24, 1994; and (c) a copy of Petitioner's receipt for payment of the $32 appeal fee, paid to the Arlington County Circuit Court.

7. On October 17, 1994, the Respondents Hart, Joyce E. Horton, and James H. Horton filed, by counsel, a joint *Brief for the Appellees*.

8. Also on October 17, 1994, Petitioner filed a memorandum in opposition to Respondent Phillips' September 23, 1994, motion to dismiss. This memorandum, which includes documentary evidence of Phillips' fraud on the trial court, again expressly brought to the Virginia Supreme Court's attention the Petitioner's allegations of Phillips' prior, during-trail fraud on the Arlington Circuit Court, which fraud had been alleged in a January 20, 1994, memorandum to the trial court, and in the

Petition for Appeal to the Virginia Supreme Court. The Virginia Supreme Court failed to rule on Respondent Phillips' motion to dismiss and on Petitioner's memorandum in opposition, and, thereby, ignored the issue of Respondent Phillips' fraud on the court and its effects upon Petitioner.

9. On October 18, 1994, Petitioner learned by telephoning the office of the clerk that a $25 filing fee was not included with the *Petition for Appeal* mailing, on September 24, 1994. Nothing was said by the clerk's office about the *Petition for Appeal* being dismissable for the $25 fee being paid subsequent to the actual filing of the *Petition for Appeal*. The clerk's office directed the Petitioner to forward the $25 filing fee.

10. On October 18, 1994, Petitioner mailed the $25 filing fee to the office of the clerk of the Virginia Supreme Court, with *praecipe*, by certified mail.

11. On October 20, 1994, the return receipt for the certified letter containing the *praecipe* and the $25 filing fee was signed for at the clerk's office. The office of the clerk received, accepted, and cashed the Petitioner's $25 check, #555, and admitted the *Petition for Appeal* to record, assigning to the *petition* record number 941785.

12. On November 3, 1994, Respondents Hart and the Hortons filed (by mail) a joint motion to dismiss the Petitioner's *petition for appeal* for not being timely filed.

13. On November 21, 1994, Mr. John Thomas Bruce, Chief Staff Attorney for the Virginia Supreme Court, sent a letter to Petitioner scheduling oral agrument for December 17, 1994.

14. On November 29, 1994, more than a week later, Mr. John Thomas Bruce sent a second letter to Petitioner, asking that the November 21st letter be disregarded.

15. On December 2, 1994, Petitioner received this November 29, 1994, letter and telephoned Mr. Bruce's office to ask about the letter's significance. As it was about 4:00 PM on a Friday when Petitioner telephoned, Mr. Bruce was not in his

office. When Petitioner stated that he was calling about a letter he received from Mr. Bruce, the secretary responded, "Oh, about the oral argument being rescheduled." Petitioner left word for Mr. Bruce to return the call.

16. On Monday, December 5, 1994, Mr. Bruce returned the telephone call to Petitioner. Upon being asked for explanation, Mr. Bruce stated that this was the first time in his 15 years service with the Virginia Supreme Court that he had had to send out such a rescheduling letter. Mr. Bruce stated that the case file had been in his office and he agreed that the case appeared substantial. Mr. Bruce stated that the clerk's office had contacted him stating that there was a motion in the file which had not been responded to. And that Petitioner would be receiving a letter from the office of the clerk.

17. On December 5, 1994, the office of the clerk sent a letter to Petitioner, asking that Petitioner respond by December 21, 1994, with a memorandum to Respondents' Hart's and the Hortons' joint motion to dismiss, (of November 3, 1994).

18. On December 14, 1994, Petitioner filed his *memorandum in opposition* to Respondents' Hart's and the Hortons' joint motion to dismiss, citing the statutory definition of timely filing for a *petition for appeal.*

19. Also on December 14, 1994, Petitioner filed his *motion for written, published, self-contained memorandum opinion of the Court's findings, rulings, and decision.* The Virginia Supreme Court failed to rule on this motion. Petitioner filed this motion because he was aware that cases regarding constitutional challenges to Virginia mechanics' liens were not being published. Petitioner had been alerted to this non-publication peculiarity, by the Virginia Supreme Court failing to publish its decision in his prior case before the Court, ***Breedlove v. Phillips, et al.***, (Va., 19th Cir., Fairfax at law #117967, 1993; refused, Va. record no. 931104 [unpubl.], 1994; cert. den., S.Ct no. 93-1910, 1994).

20. On January 24, 1994, upon consideration of Respondents Hart's and the Hortons' joint *motion to dismiss*

and Petitioner's *memorandum in opposition* thereto, the Virginia Supreme Court dismissed the *Petition for Appeal*, for Petitioner's failure to pay the filing fee timely, pursuant to Rule 5:17(f). The Virginia Supreme Court failed to rule upon Respondent Phillips' September 23, 1994, *motion to dismiss* (and Petitioner's October 17, 1994, *memorandum in opposition*, discussing fraud on the court) or upon Petitioner's December 14, 1994, *motion for written memorandum opinion* by the Court.

21. On January 26, 1995, the office of the Clerk of the Supreme Court sent Petitioner a letter, offering to refund the $25 filing fee.

22. On February 7, 1995, Petitioner filed his *Petition for Rehearing*, dated February 7, 1995. On February 9, 1995, the Clerk sent Petitioner a letter requiring that Petitioner resubmit within 14 days the *Petition for Rehearing* double spaced (as if it were a typewritten document) even though the February 7, 1995, *Petition for Rehearing* was a typeset, printed document. On February 23, 1995, Petitioner filed his *Court-Directed, Double-Spaced Petition for Rehearing*. The Virginia Supreme Court never made any reference to this double-spaced document.

23. Petitioner alleges that it was the intention of the Virginia Supreme Court, in requiring double-spacing of Petitioner's 15-page, typeset, non-double-spaced *Petition for Rehearing*, with a 15-page maximum page limit set by rules of court for a *petition for rehearing*, to force Petitioner to delete significant textual material, with the hope that Petitioner would delete: (a) the "New Allegations Regarding This Petition for Rehearing," which formed the basis for invoking the holding of *Coleman v. Thompson, supra*, and (b) the detailed allegations of Respondentn the court. Petitioner did not delete those *Coleman v. Thompson* allegations from the revised *petition*. Petitioner cited Respondents' fraud on the court and moved the detailed allegations of Respondents' fraud on the court to Petitioner's *Motion for the Court to Exert Its Superintending and Protecting Powers As To Fraud on the Court and Perversion of Court Processes by Defendants/Appellees*, dated February 25, 1995, which the Virginia Supreme Court denied subsequently, in the

April 21, 1995, *order*, without hearing the merits. For the Petitioner's specific allegations to the Virginia Supreme Court, invoking *Coleman v. Thompson*, **see** Appendix Exhibit 12, incorporated here by reference.

24. Also on February 23, 1995, Petitioner filed his *Motion For Written, Published, Self-Contained Memorandum Opinion of the Court's Findings, Rulings, and Decision in the Petition for Rehearing*, dated February 23, 1995; and his *Motion for Review of Petition for Rehearing By The Court Sitting En Banc*, dated February 23, 1995.

25. On February 25, 1995, Petitioner filed his *Motion for the Court To Exert Its Superintending and Protecting Powers As To Fraud on the Court and Perversion of Court Processes by Defendants/Appellees*, dated February 25, 1995, seeking for the Court to investigate fraud on the trial court by the Respondents. For details of the Respondents' fraud on the court, highlighted from the Virginia Supreme Court record, **see** Appendix Exhibit 15, incorporated here by reference.

26. On February 27, 1995, Petitioner filed with the Virginia Supreme Court his *Motion for Determinations of No Abridgement of Constitutional Rights by the Court, as Required by U.S. Supreme Court in Coleman v. Thompson*, dated February 27, 1995, asserting that the dismissal decision, *itself*, not on a fair and substantive basis and without the written determinations required by the U.S. Supreme Court in *Coleman v. Thompson*, 501 U.S. 722, 115 L.Ed.2d 640, 111 S.ct — (1991), abridged Petitioner's constitutional rights. The *Petition for Rehearing* contained the necessary 15 new allegations to invoke the holding of *Coleman v. Thompson, supra.* For these *Coleman v. Thompson* allegations from the *Petition for Rehearing*, **see** Appendix Exhibit 12, incorporated here by reference.

27. On April 21, 1995, the Virginia Supreme Court denied Petitioner's *Petition for Rehearing* and denied three of the Petitioner's four motions of February 23, 25, and 27, 1995. The Virginia Supreme Court failed to rule upon Petitioner's *Motion for Review of Petition for Rehearing By The Court*

Sitting En Banc, dated February 23, 1995, and failed to state in the April 21, 1995, *order* that the consideration of the *Petition for Rehearing* had been conducted by the Court sitting *en banc*.

28. On May 1, 1995, Petitioner filed his *Second Motion for Review of Petition for Rehearing, by the Court Sitting En Banc*, dated May 1, 1995, because the first motion had not been ruled upon and no statement was included in the April 21, 1995, *order* to indicate that consideration of the *Petition for Rehearing* had been conducted by the Court sitting *en banc*.

29. On May 3, 1995, Petitioner filed his *Notice of Appeal* to the U.S. Supreme Court. **See** Appendix Exhibit 10.

30. On May 25, 1995, the Virginia Supreme Court denied Petitioner's *Second Motion for Review of Petition for Rehearing, by the Court Sitting En Banc*, dated May 1, 1995, and failed to state therein that the review was conducted by the Court sitting *en banc*. Also on May 25, 1995, the Court issued its *order* deferring issuance of mandate, pending docketing of the instant appeal with the U.S. Supreme Court until July 20, 1995.

31. On May 26, 1995, the Clerk of the Virginia Supreme Court stated in latter dated May 26, 1995, that the *Petition for Rehearing* was considered by the Court, sitting *en banc*. Given the Court's two denials of Petitioner's motions for rehearing *en banc*, Petitioner asserts that the *Petition for Rehearing* was not submitted to the entire Virginia Supreme Court sitting *en banc*, because the April 21, 1995, and two May 25, 1995, *orders* addressing rehearing fail to state on their face that the *Petition for Rehearing* was considered by the Court, sitting *en banc* and, more particularly, the Petitioner's motion for rehearing *en banc*, dated February 23, 1995, was not ruled upon and the Petitioner's second motion for rehearing *en banc*, dated May 1, 1995, was denied by the Virginia Supreme Court in *order* of May 25, 1995.

Exhibit 12 *(Allegations invoking* Coleman v. Thompson, supra, *reprinted from* Petition for Rehearing, *dated February 7, 1995, and from* Court-Directed Replacement, Double-Spaced Petition for Rehearing, *dated February 23, 1995)*

"NEW ALLEGATIONS REGARDING THIS PETITION FOR REHEARING

" 1. Plaintiff/Appellant further alleges in support of his *Petition for Rehearing*:[30]

" a. The Virginia Supreme Court did not make good faith attempt to honor Appellant's federal constitutional rights.

" b. The failure of the Virginia Supreme Court to hear the Appellant's timely-filed state *petition for appeal* violated one or more of the Appellant's federal constitutional rights.

" c. The Virginia Supreme Court's dismissal, *itself*, abridged one or more of Plaintiff/Appellant's federal constitutional rights, in that it violated procedural due process and equal protection under law.

" d. The Virginia Supreme Court failed to make a determination, consistent with *Tharp v. Commonwealth, supra*, that dismissing the instant *Petition for Appeal*, in and of itself, (a) would not abridge any constitutional rights and, therefore, (b) would not merit such necessary excusal of inexact compliance with an administrative rule for a non-jurisdictional filing fee—Rule 5:17 (f)—when the $25 filing fee was collected subsequent to the timely filing of the *Petition for Appeal*.[31]

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[30] The following statement and quotation are quoted directly from the footnote in the *Petition for Rehearing*, and in its revision, containing the same statement and quotation: "Appellant makes these allegations herein to preserve his rights, pursuant to *Coleman v. Thompson, supra*, and to the dictum of the U.S. Supreme Court, therein, citing from *Yakus v. United States*, 321 U.S. 414, 88 L.Ed 834, 64 S.Ct 660 (1944) as follows:

> "'No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. Id., at 444, 88 L.Ed 834, 64 S.Ct 660.'"

[31] *Tharp v. Commonwealth*, 211 Va., at 3.

Failure to excuse and dismissing under a non-jurisdictional, discretionary rule, rather than on a fair and substantive basis, denies hearing the merits and rendering decisions on the federal constitutional questions presented. These failures of the Court denied Appellant federal procedural due process.

" e. The Virginia Supreme Court failed to make a determination, consistent with *Coleman v. Thompson, supra*, that the dismissal, *itself*, would not abridge any constitutional rights.[32]

f. The Virginia Supreme Court failed to afford comity to the federal procedural rules, particularly the federal court treatment of F. R. App. P. 3 (e), in an appeal litigating federal constitutional rights.

" g. The Virginia Supreme Court, in an appeal litigating federal constitutional rights: (1) failed to demonstrate its respect for the weight placed by federal courts upon non-jurisdictional appellate fee requirements and (2) failed to give to the state procedural rule—Virginia Rule 5:17 (f)—the same effect that federal courts give to the equivalent federal rule—F. R. App. P. 3(e)--which may be excused by federal courts of appeal.

" h. Appellant states that any cause and prejudice standard which may be applicable is met in the instant appeal where review of Appellant's claims and decision on the merits is necessary to correct "a fundamental miscarriage of justice."

" i. The Virginia Supreme Court's dismissal of this case forecloses all Virginia postdeprivational remedies for redress of Appellant for damages caused by false, fraudulent, forged, perjured Virginia mechanics' liens, without any trial on the merits.

" j. The acts of defendants and of others similarly situated, in filing false, fraudulent, forged, perjured Virginia mechanics' liens are capable of repetition, yet are evading review.

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[32] *Coleman v. Thompson, id.*, 115 L.Ed.2d, at 664.

" k. The acts of Virginia Courts in holding contrary to *Connecticut v. Doehr, supra*, are capable of repetition, yet are evading review.

" l. The Virginia Supreme Court's dismissal on the timeliness of payment of a filing fee is a tactic employed by the Virginia Supreme Court to deny the Appellant federal constitutional rights, protection, and review by dismissing on a procedural rule, improperly applied as a jurisdictional requirement, and not based on a decision of a state court on a fair and substantial basis. The Virginia Supreme Court did not dismiss pursuant to *Virginia Code §14.1-120*, which mandates collection by the Court of a $25 filing fee but, rather, dismissed under Virginia Rule 5:17 (f), on the same subject.

" m. The Virginia Supreme Court's dismissal on procedural rule, improperly applied, was an attempt to evade the federal constitutional obligations to decide the federal constitutional questions pleaded in the instant *Petition for Appeal.* The Virginia Supreme Court's dismissal under rule, rather than (*arguendo*) under statute, was an attempt to preclude federal review of a state court action, and was not a decision based on a fair and substantive basis.

" n. Appellant had cause for the Clerk of the Court's collection of the filing fee subsequent to the timely filing of the *Petition for Appeal*, and states that there is prejudice attributable to the Virginia Supreme Court's dismissal on this non-jurisdictional procedural matter.

" o. The Virginia Supreme Court possessed jurisdiction as to all parties by notice, general appearances, and the filing of briefs, motion, and memoranda and, thereafter, the Virginia Supreme Court improperly renounced or neglected its jurisdiction conferred by law and designed to protect and maintain the supremacy of the constitution and the laws made in pursuance thereof." [*Petition for Rehearing*, Va. record no. 941785, dated February 7, 1995, at pages 6-7; and *Court-Directed Replacement, Double-Spaced Petition for Rehearing*, Va. record no. 941785, dated February 23, 1995, at pages 4-6.]

Exhibit 13 (Table 1. Trial Court Errors and Constitutional Effects)[33]

Table 1. Trial Court Errors and Constitutional Effects

Trial Court Errors	Constitutional Effects of Trial Court Errors				
	Violation by Abuse of Discretion	Violation of Due Process Clauses 14th Amendment U.S. Constitution Article I, §11, Virginia Constitution	Violation of Equal Protection Clauses 14th Amendment U.S. Constitution Article I, §11, Virginia Constitution	Violation of Civil Trial by Jury Clauses 7th Amendment, U.S. Constitution Article I, §11, Virginia Constitution	Civil Rights Violation under 42 USC §1983
1. The Court erred herein by invading the prerogatives of the jury to determine questions of fact, when properly instructed, from among *disputed* pleaded facts.	YES			YES	YES
2. The Court erred by applying improperly herein the Virginia judicial procedure for determining the standing of litigants and by applying improperly herein the superintending power of the Court to police its processes.	YES		YES	YES	YES
3. The Court erred by applying improperly herein the Virginia rules of court, in that the Court four times failed to grant motions for default judgment against Defendants Hart, Joyce E. Horton, and James H. Horton, and twice failed to grant motions for default judgment against Defendant Phillips when those judgments were warranted under Rule 3:5.			YES		YES
4. The Court erred by dismissing improperly herein the causes of action against Defendant Phillips, after the parties were at issue.			YES		YES
5. The Court erred by applying improperly herein the Virginia judicial procedure of the English rule for the maintenance of actions for malicious prosecution and abuse of process.		YES	YES	YES	YES
6. The Court erred by applying improperly herein the Virginia judicial procedures, set forth in *Ayyildiz, M.D. v. Kidd* and its progeny, together with other judicial procedures, shielding an attorney from liability for wrongful use of civil process against a third party		YES	YES	YES	YES

[33] Reproduced from the *Petition for Appeal*, dated September 24, 1994, at page 2 thereof.

Exhibit 14 (Application of **Doehr***-version, three-part* **Mathews** *test)*

1. The previous, unsuccessful *petitions for certiorari* by Commonwealth Land Title Insurance Company, as intervenor on behalf of the the Federal Deposit Insurance Corporation (filed May 24, 1993), and by American Security Bank (filed August 13, 1993), which petitions were denied *certiorari*, challenged the constitutionality of the Virginia mechanics' lien law as a defense to liens adjudicated otherwise to be valid.

2. In contrast, the previous, unsuccessful *petition for certiorari*, filed May 26, 1994, in the first *Breedlove* case—*Breedlove v. Phillips, et al., supra*—challenged the constitutionality of the Virginia mechanics' lien law in seeking redress for damages attributable to false, fraudulent, forged, perjured mechanics' liens (adjudicated by a Virginia court to be "is and was invalid"), under causes of action sounding in common-law defamation, statutory defamation, and slander of title. These causes concerned false, forged, perjured documents, entitled mechanics' liens, which were pleaded as being sham. The causes of action were *demurred* to on the basis of the holding of Donohoe, supra, that a mechanics' lien is a judicial action not subject to suit for defamation, as a defense asserted by defendants who were neither parties nor pleaders to the documents complained of.

3. The first *Breedlove* challenge came at a time when no plaintiff had as yet demonstrated to the U.S. Supreme Court that the postdeprivational routes for redress in Virginia—through malicious prosecution or abuse of process—hinted at in *Donohoe, supra,* were inadequate. Apparently, at that time, this Court felt no obligation to insert itself into a presumably-workable Virginia procedure for redress of mechanics' liens through causes of action for malicious prosecution or abuse of process.

4. The instant *petition for certiorari* in the second *Breedlove* case—*Breedlove v. Hart, et al., supra*—challenges the

constitutionality of the Virginia mechanics' lien law while seeking redress for damages attributable to false, fraudulent, forged, perjured mechanics' liens (adjudicated to be "is and was invalid"), under causes of action sounding in malicious prosecution, abuse of process, and civil conspiracy, which causes have been dismissed under rulings which negate any redress of mechanics' liens in Virginia through malicious prosecution, or abuse of process, or civil conspiracy.

5. Taken together, the two *Breedlove* cases demonstrate that in Virginia there exist no postdeprivational remedies for redress of damage attributable to false, fraudulent, forged, perjured mechanics' liens. With neither predeprivational safeguards, nor adequate postdeprivational remedies, the Virginia mechanics' lien law fails to satisfy the requirements of *Connecticut v. Doehr, supra*, and, thus, is unconstitutional and should be struck down by this Court.

6. A declaration of unconstitutionality should be granted because the Virginia mechanics' lien law (*Virginia Code §43-1* through *§43-23.2*) and the associated Virginia judicial customs complained of fail to satisfy the *Doehr*-version, three-part *Mathews* test set forth in *Connecticut v. Doehr*, 501 U.S. 1, 115 L.Ed.2d at 13.

7. In light of the tests of sufficiency of Due Process protection set forth in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969), *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972), *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974), *North Georgia Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975), *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976) and, most recently, *Connecticut v. Doehr, supra*, (1991), as to the circumstances when Due Process is required, and of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 825, 94 L.Ed. 865, 70 S.Ct. 652 (1950), and its progeny, as to the minimum Due Process required:

a. The Virginia mechanics' lien law, *by its application herein*, is repugnant to the Due Process Clause of the 14th Amendment of the U.S. Constitution and of Article I, § 11, of the Virginia Constitution.

b. (1) Furthermore, the unconstitutional Virginia mechanics' lien law (*Virginia Code §43-1* through *§43-23.2*), *by its application*, fails to provide a rough parity of procedural burden on the lienor as on the lienee. For the procedural burden of $13.00 filing fee, and $1.00 notary fee, plus about one-half hour of time, a mechanics' lienor can create a mechanics' lien which the lienee can only undo through expensive litigation, over months of time, in a *§43-17.1* validity suit. (For the Petitioner to undo two false, invalid mechanics' liens required the time equivalent to $40,000 in legal fees and 17 months elapsed time, during which time the Petitioner's liened Arlington property was seized and held in *custodia legis*.)

(2) Thus, in the Petitioner's circumstances, there was *not* "rough parity of procedural burden" upon the lienor and upon the lienee; their respective procedural burdens were lopsidedly imbalanced. In a private dispute allegedly between debtor and creditor, such lopsided procedural favoritism by the State of Virginia of the lienor creditor over the rights of the lienee debtor, permitting prejudgment attachment without due process, is itself unconstitutional.

c. Further, the Constitution of the State of Virginia, Article I, § 11, affords the Petitioner another protectable interest—his *entitlement* to Equal Protection under law. Phillips, *et al.*'s filing of the unconstitutional November 27, 1991, January 14, 1992, May 7, 1992, and May 22, 1992, liens deprived the Petitioner of this significant interest or *entitlement*—his *entitlement* to equal protection under law—by the filing of liens invoking, but not in compliance with, the unconstitutional *Virginia Code §43-4 and 43-5*, deprived Petitioner of his equal protection under law.

8. a. In *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct 893 (1976), cited with approval in *Doehr, supra*, the

United States Supreme Court set forth a three-part judicial test for adequacy of due process protection, in instances of *government-initiated* deprivation of protected rights:

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors; first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or subsititute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews v. Eldridge, id.*, at 33, *id.*, at 334-335.]

b. In *Connecticut v. Doehr, supra*, the *Mathews* test was updated to acomodate instances of *private-party-initiated* deprivation of protected rights:

> "For this type of case, therefore, the relevant inquiry requires, as in Mathews, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to Mathews, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protections." [*Connecticut v. Doehr, id.*, at 13.]

c. As measured against the updated, *Doehr*-version three-part *Mathews* test, **the Virginia mechanics' lien law, *by its application*, fails to satisfy the necessary specific dictates of due process**, as interpreted by *Mullane, supra*, and its progeny.

As to the *Doehr*-version of the first *Mathews* factor—

> **"...first, consideration of the private interest that will be affected by the prejudgment measure..."** [*Connecticut v. Doehr, id.*, at 13.]

9. a. *Two* constitutionally-protected private interests of persons affected by the November 27, 1991, January 14, 1992, May 7, 1992, and May 22, 1992, mechanics' liens are involved: a property interest and a liberty interest. Phillips, *et al.*, filed November 27, 1991, January 14, 1992, May 7, 1992, and May 22, 1992, mechanics' liens without notice and without predeprivation hearing, thus without Due Process to the property owner (the Petitioner and, in one instance, a third-party property owner), and to the lienee (the Petitioner), and deprived the property owner (the Petitioner) and the lienee (the Petitioner) of *two significant* constitutionally-protected interests: (1) as a lien, by invading the property owner's property interest, and (2) as a libelous lien, employed as ancillary process, by invading the lienee's (the Petitioner's) liberty interest.

b. The false November 27, 1991, January 14, 1992, and May 22, 1992, mechanics' liens were filed against Petitioner as named lienee, as the property owner of record, and deprived the Petitioner, as *property owner*, of a significant, constitutionally-protected interest: his property interest; and as *lienee*, of another significant, constitutionally-protected interest: by a false, forged, perjured (therefore libelous) mechanics' liens invading Petitioner's liberty interest.

c. The false May 7, 1992, mechanics' lien was filed against Petitioner as named lienee, although Petitioner was no longer the property owner of record of the subject property, and deprived the Petitioner, as *lienee*, of a significant, constitutionally-protected interest: by a false, libelous mechanics' lien invading Petitioner's liberty interest.

(1) The liberty interest which was invaded in each instance is *significant*: the liens libeled Petitioner's good name, reputation, and creditworthiness to which he is *entitled* under both the federal and state constitutions.

(2) The invasion of Petitioner's liberty interest was coupled with the Petitioner being deprived of freedom of occupation, in that when the false, libelous, malicious, unconstitutional November 27, 1991, January 14, 1992, May 7, 1992, and May 22, 1992, mechanics' liens disparaged Petitioner's good name, reputation, and creditworthiness in the public land records.

(3) The November 27, 1991, January 14, 1992, May 7, 1992, and May 22, 1992, mechanics' liens stigmatized Petitioner in his trade, business and profession of purchasing, owning, operating, and selling rental and other real estate investment properties which business depends on the extension of large amounts of credit to Petitioner.

(4) The damage done to Petitioner's creditworthiness caused Petitioner to abandon his business, which he had pursued since 1983. The damage will persist indefinitely into the future and has effectively precluded Petitioner from ever pursuing this occupation again.

c. Previous federal due process cases, regarding liens, attachments, and other provisional remedies, have turned on questions of the property interest being invaded. In the instant petition, another equally important protected interest—the liberty interest—is invaded also. Thus, Petitioner claims the construction and meaning of the Due Process Clause makes it applicable also to situations where the lienee's liberty interest is invaded (whether he be the property owner at that moment of lien or not) by a false, libelous lien which names him improperly as lienee.

d. Virginia case law requires that for a lien to be valid, the lien must name the property owner of record.[34] The May 7, 1992, mechanics' lien did not name the property owner of record (the property having been sold and the deed transferring title having been recorded about six weeks prior to Phillips, *et al.*, recording the mechanics' lien). Phillips, *et al.*, did not file a

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[34] *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941).

new lien against the new property owner of record and did not sue to enforce the May 7, 1992, mechanics' lien.

e. Thus, a three-fold effect is produced by such mechanics' lien: (1) the lienee is libeled by a false, unlawful lien, invading his liberty interest, (2) the actual property owner is deprived of a significant property interest as his property is subjected to lien improperly, and (3) each is deprived of his Federal civil rights, protected under 42 USC §1983. Phillips, *et al.*, employed November 27, 1991, January 14, 1992, May 7, 1992, and May 22, 1992, mechanics' liens as ancillary process, for prejudgment attachment.

f. Thus, the first factor of the *Mathews v. Eldridge, supra*, test—significant private interests are affected—is satisfied.

As to the *Doehr*-version of the second *Mathews* factor—

> **"...second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards..."** [*Connecticut v. Doehr, id.*, at 13.]

10. The Petitioner was not accorded due process by the Virginia mechanic's lien law *by its application* and in the instant underlying *ex relatu* actions because "[D]ue Process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use." [*Sniadach v. Family Finance Corp., supra*, cited with approval in *Fuentes v. Shevin, id.*, at 579.] In this *appeal*, the underlying claim—that the Petitioner, as lienee of the November 27, 1991, and January 14, 1992, mechanics' liens, was indebted for the amount claimed to the claimant lienor—*Dennis Anderson*, a false, feigned, not-in-life fictitious person—was *untrue*.

11. The U. S. Supreme Court has stated:

> "The right to prior notice and a hearing is central to the Constitution's command of due process. 'The purpose of

this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property...' *Fuentes v. Shevin*, 407 U.S. at 80-81, 92 S.Ct., at 1994-1995." [*U.S. v. James Daniel Good Real Property*, 114 S.Ct. 492, at 500-501 (1993).]

12. The Virginia mechanics' lien law *by its application* denies to the Petitioner, as property owner and as lienee, the minimum Due Process—notice and an opportunity to be heard, as set forth in *Mullane, supra*, and its progeny—and made applicable by *Connecticut v. Doehr, supra*, to "even the temporary of partial impairments to property rights that attachments, *liens*, and other encumbrances entail."[35]

13. The *risk of erroneous (or malicious) deprivation* of constitutionally-protected private interests through the procedures provided in the Virginia mechanics' lien law is substantial, as demonstrated herein, and the probable value of additional or substitute procedural safeguards included in the Virginia mechanics' lien statutes, as demonstrated herein, was and is insufficient to mitigate that risk.

14. The *postdeprivation* safeguards which the Virginia mechanics' lien law affords are insufficient and do not adequately reduce the risk of erroneous (or malicious) deprivation. In fact, in the instant May 7, 1992 mechanics' lien, the burden of the erroneous, false, malicious deprivation fell upon an unsuspecting, subsequent owner of the property liened. The Virginia mechanics' lien law, *by its application*, does not provide adequate provisions for safeguarding Due Process. Particularly lacking in the Virginia mechanics' lien law are the following safeguards (flowing from *Connecticut v. Doehr, supra*).

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[35] "To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt,

15. The Virginia mechanics' lien statutes (i.*e.*, *Virginia Code §43-1* through *§43-23.2*) *by their application*, do not provide adequate provisions for safeguarding the Due Process protections guaranteed by the Fourteenth Amendment of the United States Constitution and by Article I, § 11, of the Virginia Constitution. Particularly lacking are the following protections:

a. The Virginia mechanics' lien statute *by its application* does not provide for prior notice of intent to file lien;

b. The Virginia mechanics' lien statute *by its application* does not provide for a predeprivation hearing;

c. (1) The Virginia mechanics' lien statute *by its application* does not provide for notice of the filing of a lien to be served upon the owner concurrent with the lien's filing.

d. The Virginia mechanics' lien statute *by its application* deprives an owner of the unrestricted use and full enjoyment of his property for an unreasonably long time. From the date the lien is filed, the lienor has six months in which to bring suit to enforce the lien; to that six months, add the time to adjudicate the suit to enforce the lien—during all of which time period the owner cannot free his property from the effects of that mechanics' lien. Plaintiff's Florida Street and Castile Court properties were in *custodia legis* for 17 months and 11 months respectively, before the Florida Street property was freed by court order in two *§43-17.1* validity suits and before the Castile Court property was freed when the two liens, placed upon it sequentially, were extinguished by action of law, suit to enforce not having been brought within the statutory six-month period,

e. The Virginia mechanics' lien statute *by its application* does not provide for an early postdeprivation hearing;

f. The Virginia mechanics' lien statute *by its application* does not provide a requirement that the lienor post a bond to protect the lienee against damages resulting from erroneous deprivation by erroneous, false, or fraudulent lien. There is no

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state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.'" [*Connecticut v. Doehr, id.*, at 14.]

adequate method for redress for damages suffered by lienee as a result of erroneous, or fraudulent, or libelous liens. Petitioner is presently in the throes of litigation, for now three and a quarter years, seeking redress for the damage done by these false, fraudulent liens. Had Petitioner had to pay legal fees for representation in the various actions in this complex litigation, Petitioner estimates that his would-be-equivalent legal fees in the total litigation to date would have amounted to in excess of $725,000 (a lifetime's earnings for most people).[36]

g. The Virginia mechanics' lien statute *by its application* does not provide that the property owner may free his property from the lien and from *custodia legis* by posting a bond;

h. The Virginia mechanics' lien statute *by its application* does not provide that the lien be issued under the supervision of a judge but, rather, provides that the recording of the lien is a ministerial function of a clerical employee in the Office of the Clerk of the Circuit Court, who admits the lien to record by endorsing the lien memorandum with the official *indicia* and attestation of the Clerk, and the date of filing. In the instant November 27, 1991 and January 14, 1992 mechanics' liens, scrutiny by a judge likely would have caught many of the failures of these liens.

i. The Virginia mechanics' lien statute *by its application* does not provide that the lien *affidavit* contain sufficient substantive facts underlying conclusory allegations of the debt alleged, and particularly no presentation of the contract upon which the lien rests, that a judge could make a meaningful determination, even if such judge were to see the *memorandum of lien* prior to the lien attaching.

j. (1) Although the Virginia mechanics' lien statute does provide for a validity hearing, in accordance with *Virginia Code §43-17.1*, the hearing is actually on the *invalidity* of the lien, with the burden of proof actually falling upon the lienee owner. The property owner can only challenge the lien in a *§43-17.1*

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[36] Petitioner now estimates that legal fees for the litigation to date, seeking redress for damages, would approximate $725,000, had Petitioner had to pay legal fees for representation.

chancery suit after attempting to obtain personal service upon the lien claimant, for the Court's *in personam* jurisdiction, or obtaining service by publication for the Court's *in rem* jurisdiction, after any dilatory tactics of the lienor, and in the normal course of the trial court's docket. This procedure is not available to a named lienee who is wrongfully named in a mechanics' lien, but who is not then the owner of record, for such named lienee lacks standing to bring a *§43-17.1* suit.

(2) Even given the availability of a *§43-17.1* postdeprivational hearing on the validity of the lien, the demonstrated cost in legal representation and the burden of proof placed upon the liened property owner to prove a lien *invalid* which is presumed to be valid, a presumption bolstered by the effect of the lien *affidavit*, only serves to make the extortion more effective. Petitioner has prevailed in having two false mechanics' liens—filed in or claiming under a false, *feigned* name of a not-in-life person as claimant, false claimant address, for false claim amount, with perjured oath and forged signature—adjudicated invalid in two *Virginia Code §43-17.1* validity suits and knows fully the burden such suits entail. Had Petitioner had to pay legal fees for representation in those two *§43-17.1* suits, Petitioner estimates that his would-be-equivalent legal fees would have amounted to in excess of $40,000. Until the Florida Street property was finally released from *custodia legis* in these *§43-17.1* suits, the property was encumbered and Petitioner was deprived of his significant property interest for 17 months.

16. The Virginia statutory and case law *postdeprivation remedies for redress* of the damages attributable to false, fraudulent, forged, perjured mechanics' liens, complained of in the instant action are inadequate, *by their application*, in that:

a. The Virginia mechanics' lien statute, *by its application*, prescribes no requirement for a lienor to post a bond, prior to liening property, to compensate a lienee harmed improperly for damage as a consequence of the lien.

b. There are no *entitlements* or effective avenues within the statutes or case law of Virginia for redress for a person deprived of constitutionally-protected rights and interests, or for a person

libeled or defamed or whose title is slandered by a false, erroneous, or fraudulent mechanics' lien.

(1) Any action for libel or defamation of title is barred, based upon *Donohoe Constr. Corp. v. Mount Vernon Assoc.*, 235 Va. 531, 369 S.E.2d 857 (1988), granting absolute privilege for a mechanics' lien as a judicial action.

(2) *Donohoe, supra,* does not create an *entitlement* to a route of redress of damages through cause of action either for malicious prosecution or for abuse of process. Any avenues of redress for malicious prosecution or abuse of process are blocked by the English rule, with the Arlington Circuit Court ruling that the filing of a mechanics' lien does not satisfy the English rule and that false, fraudulent, forged, perjured mechanics' liens cannot be abused.

c. The Virginia mechanics' lien statute, *by its application*, prescribes no procedure by which the lienee can controvert the validity of the lien in an *immediate* postdeprivation hearing,in which the lienor bears the burden of proof that the lien is valid. *Virginia Code §43-17.1* validity hearings do not occur *immediately* after the deprivation, and these hearings occur only when validity suit is brought by the lienee—after being able to accomplish service on the lienor—and in the regular course of the trial court's docket. In *§43-17.1* hearings, the lienee bears the burden of proof that a mechanics' lien (presumed valid) is invalid, rather than the lienor having to prove that the lien is valid. Petitioner has personal experience in prosecuting successfully two §43-17.1 validity suits, in which he had two of the instant mechanics' liens adjudicated "is and was invalid."

17. Thus, the Virginia mechanics' lien law, *by its application*, fails the second factor of the *Mathews v. Eldridge* test—the risk of erroneous (or malicious) deprivation through the procedures under attack is significant and the probable value of additional or alternative safeguards is inadequate.

As to the *Doehr*-version of the third *Mathews* factor—

"...and third, in contrast to Mathews, principal attention to the interest of the party seeking the prejudgment remedy,

with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protections." [*Connecticut v. Doehr, id.*, at 13.]

18. a. The interest of the private party seeking the prejudgment remedy of a mechanics' lien is not greater than the interests of the affected lienee/property owner, so as to outweigh the constitutionally-protected interests of the lienee/property owner being deprived of those interests:

(1) The interest of the mechanics' lienor in false, fraudulent, forged, perjured mechanics' liens cannot be greater than the interest of the owner of the property. A not-in-life, feigned, fictitious person, as lienor, can have no interest (either inchoate or perfected) in the prospective lienee/property owner's property.

(2) The interests of the mechanics' lienor (*Dennis Anderson*, a not-in-life feigned, fictitious person) in favor of an *ex parte* attachment of the mechanics' lien are too minimal to diminish the need for a *predeprivation* hearing, especially as the Petitioner (a) was, and is, an in-state Virginia resident, (b) was an owner of other Virginia property at the time, and therefore, (c) was servable with notice by sheriff, so that there was no need to attach the *res*—the real property—to obtain jurisdiction over Petitioner Breedlove.

(3) Virginia case law requires that for a lien to be valid, the lien must name the property owner of record.[37] The May 7, 1992, mechanics' lien did not name the property owner of record (the property having been sold and the deed transferring title having been recorded about six weeks prior to the Phillips, *et al.*, recording the May 7, 1992 lien against Petitioner). Phillips, *et al.*, (a) did not file a new lien against the new property owner of record, (b) did not bring any action against the new owner to enforce the May 7, 1992 mechanics' lien they placed on the Castile Court property, and (c) did not bring suit to enforce the May 7, 1992 lien against Petitioner, demon-

[37] *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941).

strating that the purpose of Phillips, *et al.*, was prejudgment attachment, clouding of title, and collection by coercion

b. The state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural Due Process requirements would entail, does not outweigh the constitutionally-protected interests of the lienee/property owner being deprived of those interests.

(1) The interest of the State cannot be greater than the interest of the lienor of the property in a false, fraudulent, forged, perjured mechanics' lien claiming in the name of a false, feigned, not-in-life, fictitious person. Such a false, feigned, not-in-life, fictitious person cannot have *any* interest (either inchoate or perfected), *ever*, in property.

(2) Were Virginia to intervene, the Commonwealth may well argue that the interests of the state are substantial in furthering the ability of mechanics, contractors, and building suppliers to collect amounts due to them, and that the Due-Process procedure of a predeprivation hearing would interfere with the efficient operation of Virginia statutory mechanics' lien procedures. But such argument is not well founded, as full, judicial, predeprivation hearings currently work well under the state mechanics' lien laws of Hawaii and Maryland.

(3) Furthermore, the U.S. Supreme Court has stated in *Fuentes v. Shevin:*

> "Procedural due process is not intended to promote efficiency or accomodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken." [*Fuentes v. Shevin*, 407 U.S., at 90, 32 L.Ed.2d, at 576, note 22, 92 S.Ct. 1983 (1972)]

(4) If there is to be a judicial hearing on mechanics' liens, either in Virginia's general district or circuit courts, the cost burden can be shouldered by court fees and costs, taxed as appropriate.

c. There were no exigent circumstances shown or present on the date the November 27, 1991, or January 14, 1992, or May 7, 1992, or May 22, 1992, mechanics' liens were filed by Phillips, *et al.*, which would have mandated the need to by-pass a *predeprivation* hearing. The prejudgment attachment of the November 27, 1991, January 14, 1992, May 7, 1992, and May 22, 1992, mechanics' liens occurred without a prior hearing, despite the following facts:

(1) The prejudgment attachment of the November 27, 1991, January 14, 1992, May 7, 1992, and May 22, 1992, mechanics' liens seized and held the *res*—the liened real property—in *custodia legis*, although such seizure was not directly necessary to secure an important governmental or general public interest.

(2) There was no special need for very prompt action, which would dictate the by-passing of a predeprivational hearing. Argument cannot be heard that a predeprivational hearing must be by-passed to prevent the prospective lienee from transferring the property, given advance warning (*i.e.*, notice). A valid mechanics' lien may be filed either before or after a property transfer (provided only that the mechanics' lien name the property owner of record correctly) and real estate is not subject to removal from the State court's jurisdiction.

(3) The State—the Commonwealth of Virginia—did not keep strict control over its monopoly of legitimate force. The private parties (Phillips, *et al.*) who initiated the prejudgment attachment of the November 27, 1991, January 14, 1992, May 7, 1992, and May 22, 1992, mechanics' liens, seizing and holding the properties in non-possessory seizure, were not governmental officials responsible for determining, under the standards of a narrowly-drawn statute, that it was necessary and justified. In particular, on May 7, 1992, Phillips, *et al.* filed mechanics' lien against the property of a third person, for a debt alleged against the Petitioner.

19. The U.S. Supreme Court also stated in *Fuentes v. Shevin, supra,* its criteria for truly unusual situations in which a

predeprivational hearing may be by-passed.[38] The circumstances of filing the instant mechanics' liens do not satisfy the Supreme Court's criteria: (a) there was no important governmental or general public interest to be secured by the seizure; (b) there was no special need for very prompt action; and (c) the State did not keep strict control over its monopoly of legitimate force (in fact, the State permitted false, fraudulent, forged, perjured mechanics' liens to seize and hold property).

20. The U.S. Supreme Court reaffirmed and strengthened its rationale set forth in *Fuentes, supra,* in 1993 in *U.S. v. James Daniel Good Real Property.*[39]

a. In the instant action, too, the prejudgment attachment of real estate by mechanics' lien without prior notice or hearing is unconstitutional in the absence of extraordinary circumstances, even though the attachment of the mechanics' lien *might* not interfere with the owner's use or possession and does not affect, as a general matter, rentals from existing leaseholds.

b. In the circumstances of the instant mechanics' liens, the liens *did* interfere with the owner's use of the properties, denying Petitioner unencumbered transferability and unencumbered mortgageability, due to the mechanics' liens of a false, feigned, not-in-life fictitious person.

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[38] "First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded food." [*Fuentes v. Shevin,* 407 U.S., at 91-92, 32 L.Ed.2d, at 576,-577.]

[39] "In *Fuentes,* we held that the loss of kitchen appliances and household furniture was significant enough to warrant a predeprivation hearing. 497 U.S., at 70-71, 92 S.Ct., at 1989. And in *Connecticut v. Doehr,* — U.S. —, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), we held that a state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional, in the absence of extraordinary circumstances, even though the attachment did not interfere with the owner's use or possession and did not affect, as a general matter, rentals from existing leaseholds." [*U.S. v. James Daniel Good Real Property,* — U.S., at —, — L.Ed.2d, at —, 114 S.Ct., at 501 (1993).]

21. Thus, the Virginia mechanics' lien law, *by its application*, fails the third factor of the *Mathews v. Eldridge, supra*, test—principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protection do not outweigh the need to safeguard the constitutionally-protected interests of the lienee/property owner by due process.

22. By the three-part judicial test of *Mathews v. Eldridge, supra*, as modified for private-party-initiated deprivations in *Connecticut v. Doehr, supra*, the Virginia mechanics' lien law (*Virginia Code §43-1* through *§43-23.2*), *by its application*, **is and was unconstitutional**.

***Exhibit 15** (Details of Respondents' Fraud on the Court, Highlighted from the Virginia Supreme Court Record)*[40]

1. Defendant/Appellee [*Respondent*] Phillips' initial fraud upon the Arlington Circuit Court and abuse of its process occurred by Phillips filing the false, fraudulent, forged, perjured November 27, 1991 *Dennis Anderson* mechanics' lien (*Dennis Anderson* is a false, fictitious, feigned name of a not-in-life person). Defendant/Appellant Phillips admitted under oath, in responses to interrogatories, that he, Phillips, had filed the perjured November 27, 1991 *Dennis Anderson* mechanics' lien.

3. Defendant/Appellee Phillips' subsequent fraud upon the Arlington Circuit Court occurred by Phillips filing the false, fraudulent, perjured May 22, 1992 certificate of partial release of mechanics' lien (containing another mechanics' lien) employing the November 27, 1991 lien as true.

4. Defendant/Appellee Hart's fraud upon the Arlington Circuit Court ocurred by attorney Hart employing as true in chancery suit to enforce the false, fraudulent, forged, perjured November 27, 1991 *Dennis Anderson* mechanics' lien and

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[40] Quoted in its entirety from the *Petition for Rehearing*, dated February 7, 1995, Exhibit 2, at pages A-5 – A-6.

representing that lien as true to the court, after having twice received prior written information in hand that the lien was false, fraudulent, forged and perjured.

5. In early argument by Plaintiff/Appellant [*Petitioner*], when the Plaintiff/Appellant attempted to address before the Arlington Circuit Court the alleged fraud on the court, the trial judge told Plaintiff/Appellant that if Plaintiff/Appellant did not immediately cease the fraud line of argument, the judge would impose sanctions against Plaintiff/Appellant. The Plaintiff/-Appellant ceased.

6. Defendant/Appellee Phillips' during-trial fraud on the Arlington Circuit Court occurred by Phillips misrepresenting his address to the court and to the Sheriff of Arlington County, who had been appointed as Phillips' *committee*, and then claiming that Phillips had not been noticed properly when court papers were mailed to the address for Phillips on file with the court and with the Sheriff, who was Phillips' *committee*.

7. The initial *Dennis Anderson* fraud is demonstrated: (1) in Plaintiff/Appellant's *affidavit*, dated February 16, 1994, included as Exhibit 22 to the *Second Amended Motion for Judgment*, dated and filed February 17, 1994, that *Dennis Anderson* was not in life at the commencement of the suit brought by Defendants/Appellees under *Dennis Anderson's* claim, his lien, and his pretended right; and (2) in Plaintiff/Appellant's motion, dated February 18, 1994, for defendants to show cause that *Dennis Anderson* was in life at the commencement of proceedings, consistent with *Howard v. Rawson, supra*,, and *Pates v. St. Clair, supra*,. These two Virginia cases held that the bringing of suits in feigned names was an abuse of the process of the Virginia courts.

8. The defendants' inability to respond satisfactorily to an order to show-cause that *Dennis Anderson* was in life at the commencement of proceedings would have proved the fraud on the court and proved the abuse of process by defendants, as that abuse is defined by *Howard v. Rawson, supra*, and *Fates v. St. Clair, supra*.

9. The Arlington County Circuit Court refused four times to hear (a) this show-cause motion, dated February 18, 1994,that the defendants show-cause that *Dennis Anderson* was in life at the commencement of the proceedings; (b) the plaintiff's supporting *affidavit*, dated February 16, 1994, that *Dennis Anderson* was not in life; and (c) the plaintiff's memorandum, dated February 22, 1994, in support of this motion. Plaintiff noticed this show-cause motion for hearing three times: on February 25, May 9, and May 27, 1994. The motion was refused hearing by the trial judge on each of those dates. Plaintiff noticed the show-cause motion a fourth time for July 6, 1994. Again, the show-cause motion was refused hearing a fourth time by the trial judge on that date. The trial judge dismissed the case without ruling on the show-cause motion, that *Dennis Anderson* was in life at the commencement of the proceedings.

10. On January 20, 1994, Plaintiff/Appellant filed his memorandum with the Arlington Circuit Court, addressing Phillips' during-trial fraud on the court. This memorandum, dated January 20, 1994, was a 15-page memorandum, with 19 pages of exhibits attached, some of which exhibits were court-certified records, some were filed by Phillips in the court record, some were contributed by the Sheriff of Arlington County and bearing *affidavit* and notary seal, some were letters filed with the Sheriff by Phillips, and some were Plaintiff's *affidavits*. Phillips did not enter any *affidavits* or proofs to counter the *affidavits* and proofs submitted by Plaintiff/Appellant in the exhibits to his January 20, 1994, memorandum.

11. On September 23, 1994, Defendant/Appellee Phillips filed a motion with the Virginia Supreme Court to dismiss on the grounds that Plaintiff/Appellant failed to follow Rule 5:9 and did not mail the *written statement of facts* to Phillips' correct address.

12. On October 17, 1994, Plaintiff/Appellant filed a memorandum in opposition to Phillips' September 23, 1994, motion to dismiss. This October 17, 1994, memorandum pointed out Phillips' continuation of Phillips' prior pattern of conduct in falsifying or misrepresenting Phillips' address to the

trial court and appended as Exhibit 3 thereto the Plaintiff/-Appellant's January 20, 1994, memorandum in its entirety, with all of its exhibits. Thus, the Plaintiff/Appellant's October 17, 1994, memorandum to the Virginia Supreme Court expressly brought to the Virginia Supreme Court's attention the Plaintiff/-Appellant's allegations of Phillips' prior fraud on the Arlington County Circuit Court which fraud had been alleged in the three, successive *motions for judgment* and realleged in the *Petition for Appeal* to the Virginia Supreme Court.

13. Plaintiff/Appellant asserts that the proof of Phillips' fraud on the court during the trial, which Plaintiff/Appellant submitted first to the Arlington County Circuit Court and then to the Virginia Supreme Court, surpasses the standard of weight of evidence and sustains proof of fraud on the court beyond a reasonable doubt. The Virginia Supreme Court has not ruled upon Phillips' motion to dismiss or on Plaintiff/Appellant's memorandum in opposition. Phillips was and is a previously-incarcerated convict released on parole from a six to ten-year sentence in Tennessee and subject to administration of his parole by Virginia parole authorities, under the supervision of the Virginia courts.

14. The multiple instances of the Defendants/Appellees' frauds on the court, which were converted into frauds on the Plaintiff, in judicial actions prior to trial, and during trial; and the trial judge's failure to initiate any investigation of or to provide any remedy for the frauds on the court; and the Virginia Supreme Court ignoring the frauds on the court and on the plaintiff denied Plaintiff/Appellant procedural due process and deprived Plaintiff/Appellant of his constitutional rights to equal protection under law and to a fair and impartial trial.